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# The Law Relating to SUCCESSION DUTIES in Canada

*Being*

An Analysis of the Succession Duty Acts of the  
several Provinces of Canada with comments  
upon the constitutional and other aspects  
of the legislation and references to  
pertinent decisions

— — — — —  
SECOND EDITION  
— — — — —

BY

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*Since this volume has gone to press, the Provinces of Ontario and Alberta have made certain changes in their reciprocal arrangements. Ontario has cancelled its arrangements with Nova Scotia, New Brunswick, Prince Edward Island, British Columbia and Alberta. The Province of Alberta has cancelled its reciprocal agreements with Ontario, New Brunswick, British Columbia, Great Britain and Northern Ireland.*



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## PREFACE

### To the Second Edition.

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A period of over ten years has elapsed since the first edition of this treatise was published. In that interval, the Privy Council delivered an important judgment in the case of *Provincial Treasurer of Alberta v. Kerr* (1933), A.C. 710. This decision definitely disposed of the idea, hitherto widely entertained, that for provincial death duty purposes the movable or personal property of deceased persons could be regarded as situate, not only in the province where it is found, but also where the deceased owner was domiciled at the time of his death, applying the maxim *mobilia sequuntur personam*. It is now clear that where property is the subject-matter of taxation it can only be taxed by the province in which it is physically or actually located. The Judicial Committee has thus over-ruled, on this point, numerous prior decisions of the Canadian Courts.

Subsequent to the finding in the *Kerr* case, the statute law of several of the provinces was amended. The provinces of New Brunswick, Manitoba, Alberta, and the Yukon Territory, now possess more or less uniform legislation by which taxation is imposed upon property and persons as follows:—

- (a) Property of deceased persons situate within the province and passing to any person for a beneficial interest; and
- (b) Persons domiciled or resident within the province to whom pass, under the law of the province, on the death of a person domiciled therein, any beneficial interest in any personal property of the deceased situate without the province.

The provinces of Ontario and British Columbia have made provision for the taxation of property situate within

the province, irrespective of where the deceased was domiciled at the time of his death. Provision has also been made for the taxation of every transmission within the province owing to the death of any person domiciled therein of personal property locally situate outside the provincial boundaries. A new departure has recently been taken by Ontario in rendering liable to taxation (a) every disposition of any property (other than realty situate outside Ontario) made within Ontario by any deceased person during his lifetime, on or after the 1st day of July, 1892; and (b) every person to whom a disposition of any personal property (other than the property mentioned in clause g of section 6a of the Act) was made by the deceased in his lifetime outside Ontario, in respect of such personal property, when such deceased person was domiciled within Ontario at the time of such disposition and at the time of his death, and when the person to whom such disposition was made was resident or domiciled within Ontario at the time of such disposition and at the time of the death of the deceased person.

Having regard to the recent judgment delivered by Robson, J.A., of the Manitoba Court of Appeal, in the case of *In re Bennett, Provincial Treasurer v. Bennett* (1936), 2 D.L.R. 291, and to the well-known principle that taxing statutes must be construed strictly, it is thought that some difficulties may be encountered in the administration of these revised methods of taxation.

Relying upon the judgment delivered by the present Chief Justice of Canada in *The King v. Cotton*, 1 D.L.R. 398, at pp. 419 *et seq.*, the Province of Saskatchewan has imposed duties in respect of the succession to all movable or personal property of domiciled decedents, by way of condition upon or as an incident of the accession to the benefits of the succession. This type of taxation places the emphasis upon the fact that the benefit derived upon the distribution of the movable or personal estate of a domiciled decedent is a benefit derived from the law of the domicile.

The Quebec legislation entitled the Beneficiaries Seizin Act, chapter 30, Revised Statutes of Quebec, 1925, resembles the law in Saskatchewan in that the emphasis is placed upon the Court fees charged thereby being a tax upon or in respect of the privilege of succeeding to property, rather than upon the property itself.

Relative to taxation in respect of the succession, the opinion has been expressed that in order to render provincial taxation valid, the person or property taxed must be within the province, and that the mere right or privilege of succeeding to property on the death of a domiciled decedent cannot be taxed where both the property and the beneficiaries are outside the province. As against this view, however, the argument can be advanced that, as the provincial legislatures have control in all matters concerning the distribution of the estates of domiciled decedents, such control should logically enable the provinces to withhold from the beneficiaries a percentage of the benefits passing as a condition upon or as an incident of the accession to such benefits. The precise point has not yet come before the Privy Council for decision.

The decision of the Judicial Committee in the *Kerr* case, the numerous changes which have been made in the statute law of the provinces, and the decisions of the Courts on aspects of the law other than the constitutional aspect have called forth the second edition of this treatise.

It is hoped that the present volume may be found of some value as a work of reference by those interested in the subject of succession duties so far as this mode of taxation affects estates situated in Canada or estates belonging to persons dying domiciled in a Canadian province.

S. QUIGG, K.C.

Regina, Sask., May, 1937.



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# **The Law Relating to Succession Duties in Canada**

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## **CHAPTER I.**

### **CONSTRUCTION AND APPLICATION OF TAXING STATUTES.**

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In the sense that no rule of construction is permitted to defeat the plain intention of the Legislature, it can be said that there are no special rules for construing taxing enactments. Thus, in *Attorney-General v. Carlton Bank* (1899), 2 Q.B. 158, at p. 164; 68 L.J.Q.B. 788, at pp. 791, 792, Lord Russell, C.J., says: "I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a Taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject; namely, to give effect to the intention of the Legislature as that intention is to be gathered from the language employed, having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject-matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the Legislature has said."

The observations of Lord Russell, however, are not inconsistent with the view that there are certain well-known

and well-defined principles applicable especially to the construction of taxing Acts. These principles may be briefly stated as follows:—

- (a) The words imposing the tax must be clear.
- (b) The words used must be construed in their natural sense.
- (c) There is no such a thing as an equitable construction of a taxing Act.
- (d) The burden is on those who seek to enforce the tax, and, in cases of doubtful expressions, the taxpayer is to be deemed to be exempt.
- (e) Where doubt arises as to a provision enacting an exemption the doubt is to be resolved in favour of the Crown.
- (f) Effect is to be given to the intention of the legislature.
- (g) A statute is presumed to have a prospective rather than a retrospective effect.

#### **The Tax Must Be Clearly Imposed.**

A statute which imposes a tax or duty must be clear and express; and any ambiguity will entitle the subject to be exempt from the impost. This rule has received abundant illustration in the decisions of the Courts.

“The rule”, said the Judicial Committee, is “that the intention to impose a charge upon the subject must be shown by clear and unambiguous language.” *Oriental Bank Corporation v. Wright* (1880), 5 App. Cas. 842; 50 L.J.P.C. 1; 43 L.T. 177, P.C.

“I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently

within the spirit of the law the case might otherwise appear to be." (Lord Cairns).—*Partington v. Attorney-General* (1869), L.R. 4 H.L. 100, 122; 38 L.J. Ex. 205; 21 L.T. 370 H.L.; affirming S.C. *sub nom. Attorney-General v. Partington* (1864), 3 H. & C. 193, Ex. Ch.

"It is a well-established rule that the subject is not to be taxed without clear words for that purpose and also that every Act of Parliament must be read according to the natural construction of its words." (Parke, B.).—*Re Micklethwait* (1855), 11 Exch. 452; 25 L.J. Ex. 19; 156 E.R. 908.

"The intention to impose a tax or duty, or to increase a tax or duty already imposed, must be shown by clear and unambiguous words." (Lord Parker) —*Brunton v. Stamp Duties Commissioner* (1913), A.C. 747; 84 L.J.P.C. 139; 108 L.T. 932, 29 T.L.R. 607, P.C.

"No proposition is better established than that a tax cannot be imposed on a subject unless by clear words." (Lord Wensleydale).—*Braybrooke (Lord) v. Attorney-General* (1861), 9 H.L. Cas. 150; 31 L.J. Ex. 177; 4 L.T. 218; 7 Jur. N.S. 741; 9 W.R. 601, 11 E.R. 685, H.L.

"A taxing Act must be construed strictly; you must find words to impose the tax and if words are not found which impose the tax it is not to be imposed." (Lord Cairns)—*Cor v. Rabbits* (1878), 3 App. Cas. 473; 47 I. J.Q.B. 385; 38 L.T. 430; 42 J.P. 676; 26 W.R. 483, H.L.

"The cases which have decided that taxing Acts are to be construed with strictness and that no payment is to be exacted from the subject which is not clearly and unequivocally required by the Act of Parliament to be made, probably meant little more than this, that inasmuch as there was not any *a priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the taxpayer and the taxing authority, no reasoning founded upon any supposed relationship of the taxpayer and the taxing authority could be brought to bear upon the construction of the Act and therefore the taxpayer had a right to stand upon a literal construction of the words used whatever might be

the consequence." (Lord Cairns).—*Pryce v. Monmouthshire Canal & Ry. Cos.* (1879), 4 App. Cas. 197; 49 L.J.Q.B. 130; 40 L.T. 630; 43 J.P. 524; 27 W.R. 666, H.L.

"Therefore the Crown fails if the case is not brought within the words of the statute, interpreted according to their natural meaning; and if there is a case which is not covered by the statute so interpreted, that can only be cured by legislation, and not by any attempt to construe it benevolently in favour of the Crown." (Collins, M.R.).—*Attorney-General v. Earl of Selborne* (1902), 1 K.B. 388; 71 L.J.K.B. 289; 85 L.T. 714; 66 J.P. 132; 50 W.R. 210; 18 T.L.R. 111.

"I am only reiterating what has been said over and over again in dealing with taxing Acts when I say that we have no governing principle of the Act to look at; we have simply to go on the Act itself to see whether the duty claimed under it is that which the Legislature has enacted." (Lord Halsbury).—*Lord Advocate v. Fleming* (1897), A.C. 145; 66 L.J.P.C. 41; 61 J.P. 692.

"In a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act except to take such tax as the statute imposes. Cases, therefore, under the Taxing Acts always resolve themselves into the question whether or not the words of the Act have reached the alleged subject of taxation." (Lord Halsbury).—*Tennant v. Smith* (1892), A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 8 T.L.R. 434.

"Acts of Parliament which impose legacy duty, like all other Taxing Acts, are to be read strictly; that is to say, they are not to be extended so as to have the effect of imposing on the subject a tax which Parliament has not clearly made him pay" (Lindley, L.J.).—*In re J. Thorley* (1891), 2 Ch. 613, at p. 623; 60 L.J. Ch. 537, at p. 538.

"The Act upon the construction of which the question in this case turns is a Taxing Act, and, being so, must in my opinion be construed strictly, and the onus lies upon the Crown to show that the persons whom it is sought to tax fall clearly within its operation." (Lord Alverstone).—*Whiteley v. Burns* (1908), 1 K.B. 705; 77 L.J.K.B. 467; 98 L.T. 836; 72 J.P. 127; 24 T.L.R. 319.

Canadian Decisions.—There are a number of Canadian cases in which the principle of strict construction of taxing statutes has been mentioned.

"To impose a tax legally, there must have been a valid assessment. A taxing Act must be construed strictly: *Cor v. Rabbits* (1878), 3 App. Cas. 473. The making of a valid assessment is an imperative requirement." (Kelly, J.).—*Sturgeon Falls v. Imperial Land Co.*, 7 D.L.R. 352; 31 O.L.R. 62.

"We should take into consideration also the fact that a statute imposing a tax should always be strictly construed and that, in case of doubt, the tax should not be levied. Maxwell 'Interpretation of Statutes,' 5th ed., p. 461; *Ayer v. The Queen*, 1 Can. Ex. C.R. 276; *Cor v. Rabbits*, 3 A.C. 473." (Brodeur, J.).—*Foss Lumber Co. v. The King*; and *The British Columbia Lumber Co.*, 8 D.L.R. 437; 47 S.C.R. 130.

"The rule for the construction of a taxing statute is most satisfactorily stated, I think, by Lord Cairns in *Partington v Attorney-General* (1869), L.R. 4 H.L. 100, at p. 122. Lord Cairns, of course, does not mean to say that in ascertaining 'the letter of the law', you can ignore the context in which the words to be construed stand. What is meant is, that you are to give effect to the meaning of the language; you are not to assume 'any governing purpose in the Act to do more than take such tax as the statute imposes', as Lord Halsbury said in *Tennant v. Smith* (1932), A.C. 150, at p. 154." (Duff, J.).—*Versailles Sweets Ltd. v. Attorney-General of Canada* (1924), 3 D.L.R. 884; affirming 25 O.W.N. 357; affirming 25 O.W.N. 15.

### Words Construed in Their Natural Sense.

"It has often been said by Judges of very great experience that, in construing Acts relating to the revenue, the popular sense of the words rather than their strict legal meaning should be looked at, and the reason for that is obvious. The object of Taxing Acts has nothing to do with the strict legal meaning of words, unless the words used are words of art, such as words which describe an estate in real



property, or technical terms peculiar to English law." (Pollock, B.).—*Smelting Company of Australia v. Commissioners of Inland Revenue* (1896), 2 Q.B. 179, at p. 184; 65 L.J. Q.B. 513, at p. 514.

"The duty of a Court of law is simply to take the statute it has to construe as it stands, and to construe its words according to their natural significance. While reference may be made to the state of the law, and the material facts and events with which it is apparent that Parliament is dealing, it is not admissible to speculate on the probable opinions and motives of those who framed the legislation, excepting in so far as these appear from the language of the statute. That language must, indeed, be read as a whole. If the clearly expressed scheme of the Act requires it, particular expressions may have to be read in a sense which would not be the natural one if they could be taken by themselves. But subject to this the words used must be given their natural meaning, unless to do so would lead to a result which is so absurd that it cannot be supposed, in the absence of expressions which are wholly unambiguous, to have been contemplated." (Lord Haldane).—*Inland Revenue Commissioners v. Herbert* (1913), A.C. 326; 82 L.J.P.C. 119; 108 L.T. 850; 29 T.L.R. 502.

"This is a taxing Act, and it is essential to see that the tax is expressly imposed, that the subject is not taxed without clear words, and that the natural construction is given to the words used." (Lord Ashbourne).—*Attorney-General v. Beech* (1899), A.C. 53; 68 L.J.Q.B. 130; 79 L.T. 565; 63 J.P. 116; 47 W.R. 257, 15 T.L.R. 85.

### Equitable Construction is Not Admissible.

"If there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute." (Lord Cairns).—*Partington v. Attorney-General*, *supra*.

"It is well established that one is bound, in construing Revenue Acts, to give a fair and reasonable construction to

their language without leaning to one side or the other, that no tax can be imposed on a subject by an Act of Parliament without words in it clearly showing an intention to lay the burden upon him, that the words of the statute must be adhered to, and that so called equitable constructions of them are not permissible." (Lord Atkinson).—*Ormond Investment Company v. Betts* (1928), A.C. 143; 97 L.J.K.B. 342; 138 L.T. 600.

**If Act is Ambiguous, the Subject is Entitled to the Benefit of the Doubt.**

"It was unquestionable that, as a general principle, where Acts of Parliament imposed fiscal duties on the subject, they must be construed reasonably; and if they were ambiguous, the subject was entitled to the benefit of the doubt, not merely where the ingenuity of counsel was able to show that the language might have been more clear to show the intention of the Legislature, but where the judicial mind entertained a reasonable doubt as to such intention, and retained it after a careful examination and consideration. In such a case the Court was bound to give the subject the benefit of the doubt, although the inclination of opinion might be contrary to such interpretation." (*Kindersley, V.C.*).—*Wilcox v. Smith* (1857), 4 Drew. 40; 26 L.J. Ch. 596, 3 Jur. N.S. 604; 5 W.R. 667.

"The principle has often been laid down that taxing Acts are to be construed strictly. Where the Legislature has given the Crown revenue, that revenue must be exacted, however burdensome; but where the Legislature has not given the Crown the revenue, the Act cannot be strained or supplemented by any implications to effect that object." (*Hamilton, J.*).—*Attorney-General v. Pick* (1912), 2 K.B. 192; 81 L.J.K.B. 574; 106 L.T. 630; affirmed (1913), 2 K.B. 487, C.A.

**Onus of Showing Exemption on Taxpayer.**

Where the Crown has established *prima facie* a claim for a duty or tax, any doubt which arises as to whether or not an exemption applies must be resolved in its favour.

"I think it proper to say that, *in dubio*, I should deem it the duty of the Court to reject any construction of a modern statute which implied the extension of a class privilege of exemption from taxation, provided the language reasonably admitted of another interpretation." (Lord Young).—*Hogg v. Parochial Board of Auchtermuchty* (1880), 7 Rettie (Sc.) 986.

"The rule of construction of taxing statutes is scarcely applicable in the sense applied because what we are construing is not a provision imposing a tax but one exempting from the general imposition and the rule in that case would be rather against the one claiming the exemption. See *The King v. School District of Madawaska* (1919), 49 D.L.R. 371; 46 N.B.R. 506; affirmed 56 D.L.R. 95." (Harvey, C.J.).—*The King and the Provincial Treasurer of Alberta v. Canadian Northern Railway Company and Canadian National Railway Company* (1921), 1 W.W.R. 1178; 16 Alta. L.R. 220, 58 D.L.R. 624.

#### Intention of the Legislature.

"The opinion that statutes passed with the intention of imposing a tax are to be so construed as to defeat their intention, provided the words admit of several constructions, and any of the constructions would have that effect; also the opinion that if the words admit of a doubt in the mind, either of the tax collector or the taxpayer, the one ought to refuse to collect and the other to pay appears to us to require limitation. Effect is to be given to the intention of the Legislature, to be collected from the context of the whole statute construed with reference to the purpose expressed therein. It is no part of the duty of the Judges to endeavour to defeat the intention of the Legislature, either in respect to the imposition of the tax or otherwise; the whole community has an equal interest that every part of it should contribute its quota to the general income derived from taxes, and all statutes are to be construed by the rules that tend to discover the intention of the Legislature expressed therein." (Erle, C.J.).—*R. v. Dickson* (1863), 2 New Rep. 400; 11 W.R. 919; *sub nom. Dickson v. R.*, 8 L.T. 578, Ex. Ch.

"The right and, indeed, the only method of interpretation is to ascertain the intention of the Legislature from the language and provisions of the Act itself. In construing a statute regard must be had to the ordinary rules of law applicable to the subject-matter, and these rules must prevail except in so far as the statute show that they are to be disregarded; and the burden of showing that they are to be disregarded rests upon those who seek to maintain that proposition. It is incumbent on the Crown when claiming the tax to make out affirmatively that the case falls within the statute. You must see that the tax is expressly imposed; the subject is not to be taxed without clear words, and the Act, like any other Act, must be read according to the natural construction of the words." (Chitty, L.J.).—*Attorney-General v. Beech* (1898), 2 Q.B. 147; 67 L.J.Q.B. 585; 78 L.T. 584; 14 T.L.R. 380, C.A.

"Statutes imposing duties are to be construed as not to make any instruments liable to them unless manifestly within the intention of the Legislature." (Lord Tenterden).—*Tomkins v. Ashby* (1827), 6 B. & C. 541, 542.

### Retrospective Legislation.

It is a well known rule of construction that statutes are not to be interpreted so as to have a retrospective operation, unless they contain clear and express words to that effect, or the object, subject-matter, or context shows that such was their object.

"It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction. And the same rule involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary." (Lindley, L.J.).—*Lauri v. Renad* (1892), 3 Ch. 402; 61 L.J. Ch. 580; 67 L.T. 275; 40 W.R. 678; 8 T.L.R. 637.

"It is obviously competent for the Legislature, if it pleases, in its wisdom, to make the provisions of an Act

retrospective; but before giving such a construction to an Act of Parliament one would require that it should either appear very clearly in the terms of the Act, or arise by necessary and distinct implication." (Lord Ashbourne).—*Smith v. Callander* (1901), A.C. 297; 70 L.J.P.C. 53; 84 L.T. 801, H.L.

"A retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of other interpretation, it ought to be construed as prospective only." (Wright, J.).—*Re Athlumney, Ex parte Wilson* (1898), 2 Q.B. 547; 67 L.J.Q.B. 935; 47 W.R. 144.

The principle that a retrospective construction of a statute is improper, unless the terms of the Act clearly authorize such a construction, has been applied in succession duty cases in Canada.

In *Attorney-General of Nova Scotia v. Parker*, 31 N.S.R. 202, the facts were that Martin Pinckney Black, by his last will, directed his trustees to invest a portion of his estate and pay the income arising therefrom to his brother Charles, and, at their discretion, to pay Charles a portion of the principal, and, after the death of Charles, to pay the principal remaining to such uses and purposes as he should by deed or will appoint. Martin Pinckney Black died on the 19th day of April, 1891, some years before the passage of The Succession Duty Act, 1895. Charles died on the 30th day of December, 1897, after the passing of the Act, having exercised his power of appointment by will made on the 3rd day of June, 1897. It was held that the fund in question did not pass, within the meaning of the Act, by the exercise of the power of appointment by Charles, the appointees taking under the instrument creating the power, and not by virtue of the power itself. It was also held that the Act must be construed as applying only to deaths occurring after its passage.

*In re McIntyre Estate* (1933), 2 W.W.R. 257, a surtax was held not to be applicable in the following circumstances: Donald Campbell McIntyre died on 29th April, 1932, leaving an estate of \$23,819.67, on which succession duty under The Manitoba Succession Duty Act, 1930, Chapter 38, was assessed at \$1,662.42, including a surtax of 15 per cent. The surtax was imposed by Chapter 49, Statutes of Manitoba, 1932, which came into force on 7th May, 1932. It was held that the estate was not liable for the surtax, the deceased having died prior to the coming into force of the amending statute.

The effect of making a Succession Duty enactment retroactive in relation to the payment of interest was discussed in the judgment delivered by Robertson, J., *In re Mercer Estate* (1934), 3 W.W.R. 382; 49 B.C.R. 294. John Murdock Mercer died on 11th April, 1933. By a judgment of the 29th November, 1933, affirmed by the Court of Appeal on the 20th February, 1934, the British Columbia Succession Duty Act was declared *ultra vires*. On 29th March, 1934, the new Succession Duty Act came into force. Section 50 of that Act provided that it should be retroactive and should apply in respect of persons who had died since 11th April, 1894, and further provided that the Act should be deemed to be and to declare the law relating to the matter of succession duty payable upon the death of any person dying before the commencement of the Act, whether or not the matter was pending or had been adjudicated upon by any Court. Section 11 of the Act provided for interest being added to the duty as from the date of death if payment was not made within six months from death. Section 38 provided for a Judge of the Supreme Court making an order extending the time fixed by law for payment of duty, and also the date when interest should be chargeable. The succession duties in the estate were not fixed and determined until 31st May, 1934. An application was made under section 38 for an order that interest should be payable from 31st May, 1934, as payment within the time prescribed by the Act was impossible owing to a cause beyond the control

of the executors. It was held that as an *ultra vires* Act is one which never had any legal being, this application must be dealt with as if there had been no Succession Duty Act prior to the one in force, and, as the Act in force was not passed until more than six months after the death of the testator, the applicant came within section 38, and interest should only be chargeable as from 31st May, 1934.

### Penalty Provisions.

Most of the Succession Duty Acts in Canada contain provisions imposing penalties for the purpose of preventing evasions of the statutory regulations. It is said that penal statutes must be construed strictly.

"I admit that the common distinction between penal and remedial Acts, namely, that the one is to be construed strictly, the other liberally, ought not to be erased from the mind of a Judge, yet, whatever be the Act, be it penal, and certainly if remedial, we ought always to look for its true construction. In that respect, there ought to be no distinction between a penal and a remedial statute. If the remedial statute does not extend to the particular matter under consideration, we have no power to legislate so as to extend it. Undoubtedly we are thus far bound to a strict construction in a penal statute, that if there be a fair and reasonable doubt, we must act as in revenue cases, where the rule is, that the subject is not to be taxed without clear words for that purpose." (Pollock, C.B.).—*Nicholson v. Fields* (1862), 7 H. & N. 810, 31 L.J. Ex. 233; 158 E.R. 695.

## CHAPTER 11.

### CONSTITUTIONALITY OF SUCCESSION DUTIES.

The subject of provincial powers of taxation is dealt with by section 92(2) of The British North America Act, 1867, which provides as follows:—

**92.** In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:

2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.

The taxing powers of the provinces are accordingly subject to two express limitations, namely:

1. The taxation must be direct; and
2. It must be within the province.

#### 1. Direct Taxation.

The question as to what constitutes "direct taxation" has been considered by the Judicial Committee of the Privy Council in a number of cases, and it has been established that the meaning to be attributed to these words is substantially the definition contained in the treatise of John Stuart Mill. This definition is as follows:—

"A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

*Attorney-General for Quebec v. Queen Insurance Company* (1878), 3 App. Cas. 1090; 38 L.T. 897 P.C. In this case it was held that the clauses of the Quebec Act, 39 Vict., ch. 7, which imposed a tax upon certain policies of insurance, and certain receipts or renewals, were not authorized by The British North America Act, section 92, sub-sections



2 and 9. The imposition of a stamp duty on policies, renewals and receipts, with provisions for avoiding the policy, renewal, or receipt in a Court of law, if the stamp was not affixed, was not warranted by the terms of an Act which authorised the imposition of direct taxation.

The judgment of the Judicial Committee proceeds:

"The single point to be decided upon is whether a Stamp Act—an Act imposing a stamp on policies, renewals, or receipts, with provisions for avoiding the policy, renewal, or receipt, in a Court of law, if the stamp is not affixed,—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have, and in trying to find out their meaning, we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the Court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the Courts of law. Taken in either way there is a multitude of authorities to show that such a stamp imposed by the Legislature is not direct taxation."

*Attorney-General of Quebec v. Read* (1884), 10 App. Cas. 141; 54 L.J.P.C. 12; 52 L.T. 393; 33 W.R. 618, P.C. Here the question at issue was as to whether or not a provincial Act which imposed a duty of ten cents upon every exhibit filed in Court, in any action depending therein, was *intra vires*. In holding that the Act was invalid, the Committee referred to Mill's definitions of direct and indirect taxation, and proceeded:

"Well, now, taking the first part of that definition, can it be said that a tax of this nature, a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice, is one which is demanded from the very persons who it is intended or desired should pay

it? It must be paid in the course of the legal proceeding, whether that it is of a friendly or of a litigious nature. It must, unless in the case of the last and final proceeding after judgment, be paid when the ultimate termination of those proceedings is uncertain; and from the very nature of such proceedings, until they terminate, as a rule, and speaking generally, the ultimate incidence of such a payment cannot be ascertained."

*Bank of Toronto v. Lamb* (1887), 12 App. Cas. 141; 56 L.J.P.C. 87; 57 L.T. 377; 3 T.L.R. 742, P.C. The Quebec Act, 45 Vict., ch. 22, which imposed direct taxes on certain commercial corporations carrying on business in the province, was held to be *intra vires* the Provincial Legislature. In the case of banks the tax imposed by the Act was a sum varying with the paid-up capital, and an additional sum for each office or place of business. The Committee again applied Mill's definition, stating that,—

"Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.

"The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumer of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

Mill's definition is taken because, says the Committee, "it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious *indicia* of direct and indirect taxation, which is a common understanding, and is likely to have been present in the minds of those who passed the Federation Act."

Describing the tax upon banks, the judgment proceeds,—

"But the tax now in question is demanded directly of the bank apparently for the reasonable purpose of getting con-

tributions for provincial purposes from those who are making profits by provincial business. It is not a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings the bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of tax paid, and if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec Government."

*Brewers & Maltsters' Association of Ontario v. Attorney-General for Ontario* (1897), A.C. 231; 66 L.J.P.C. 34; 76 L.T. 61; 13 T.L.R. 197, P.C. The Liquor Licence Act (Revised Statutes of Ontario, ch. 194), sec. 51(2), required every brewer and distiller to obtain a licence thereunder to sell wholesale within the province. The question referred to the Court of Appeal for Ontario was as to the validity of such legislation. The Court held it to be valid, following *Bank of Toronto v. Lambe*, and this decision was affirmed by the Privy Council.

*Attorney-General for Manitoba v. Attorney-General for Canada* (1925), A.C. 561; 94 L.J.P.C. 146; 133 L.T. 193; 41 T.L.R. 409. In answer to questions referred by the Governor-General, namely: (1) whether the Legislature of Manitoba had authority to enact chapter 17 of its statutes for 1923, entitled "An Act to provide for the collection of a tax from persons selling grain for future delivery," and (2), if the Act was *ultra vires* in certain parts, then in what particulars it was *ultra vires*: It was held that the Act was wholly *ultra vires*, since in many transactions to which it related the person paying the tax would indemnify himself at the expense of others, and it was not possible to assume that the Legislature intended to pass it in a truncated form.

*Attorney-General for British Columbia v. Canadian Pacific Railway Company* (1927), A.C. 934; 96 L.J.P.C. 149; 137 L.T. 745; 43 T.L.R. 750. In this case it was held that an Act of the Legislature of British Columbia, Fuel-Oil Tax Act, R.S.B.C. 1924 (ch. 251), requiring that every person who shall purchase within the Province fuel-oil for the first time after its manufacture in, or importation into, the province, shall pay a tax thereon, is *ultra vires* of the Legislature. Here Viscount Haldane said:

"It was laid down by the Board that while a direct tax is one that is demanded from the very person who it is intended or desired should pay it, an indirect tax is that which is demanded from one person in the expectation and with the intention that he should indemnify himself at the expense of another, as may be the case with excise and customs. A tax levied on brokers and agents and factors, as well as on sellers, obviously fell within the definition of indirect taxation."

*The King v. Caledonian Collieries, Limited* (1928), A.C. 358; 97 L.J.P.C. 94; 139 L.T. 525; 44 T.L.R. 622, P.C. The Mine Owners Tax Act, (1923) (ch. 33), of Alberta, purported to impose upon every mine owner, as therein defined, a percentage tax upon the gross revenue of his mine during each preceding month. It was held that the tax was not direct taxation, and that the Act was *ultra vires*.

*Attorney-General for British Columbia v. Kingcome Navigation Company, Limited* (1934), A.C. 45; 103 L.J.P.C. 1; 150 L.T. 81; 50 T.L.R. 83, P.C. The Fuel-Oil Tax Act, 1930, of British Columbia, which imposed a tax upon every consumer of fuel-oil according to the quantity which he had consumed, was held to be *intra vires*; the tax was direct taxation, because it was demanded from the very persons who it was intended or desired should pay it.

The leading case upon the question of direct and indirect taxation, so far as it relates to succession duties, is *Cotton v. The King* (1914), A.C. 176; 83 L.J.P.C. 105; 110 L.T. 276; 30 T.L.R. 71, P.C. By petition of right, a claim was made for the refund of succession duties paid by the

petitioners and exacted by the Government of Quebec in virtue of the statutes of the Province of Quebec in respect of duties exigible on the transmission of property in consequence of the death of the owner. The amount demanded was \$31,492.02, of which \$10,545.55 had been paid in respect of part of the succession of Charlotte L. Cotton, deceased, and the remainder in respect of part of the succession of Henry H. Cotton, deceased. The claim was made on the ground that these portions of the estates consisted of personal property which was locally situated in the State of Massachusetts, U.S.A., and, consequently, not subject to the imposition of succession duty by the Provincial Legislature.

The Quebec Superior Court maintained the petition of right as to the whole of the amount demanded, with interest from the date of the institution of the action. On appeal to the Court of King's Bench, this judgment was affirmed, with a slight modification. The Supreme Court of Canada partly reversed the judgment, and held, by a majority, that the movable property situate outside the limits of Quebec forming part of the succession of Henry H. Cotton was subject to the duty imposed. On an equal division of opinion among the Judges of the Supreme Court of Canada the judgment was affirmed in so far as it held that the movable property situate outside the limits of Quebec forming part of the estate of Charlotte L. Cotton was not liable to such taxation.

On a further appeal to the Privy Council, the judgment of the Quebec Superior Court was restored, on the following grounds, namely—

- (a) That by the words of limitation inserted in the operative clause of the Quebec legislation, the Legislature made it clear that it did not intend to tax the whole of the property of the deceased, but only those of his goods which were "situés dans la province."

- (b) That the taxation imposed by The Quebec Succession Duties Act, 1906, was indirect, and that the statute was accordingly *ultra vires* of the Provincial Legislature.

Commenting on the provisions of the statute, by way of showing how it was regarded as imposing indirect taxation, Lord Moulton says:

"There is, however, a second question in the case, the decision of which in favour of the appellants would lead to the same result. This question is the following: whether a succession duty of the kind contended for by the respondent could be imposed by the Provincial Legislature without exceeding its powers. In considering this point we may assume that the operative clause specifically extends to the taxation of all the property of the testator as defined in the statute, or, to express it more simply, that the limiting words 'in the province' have been deleted from that clause. Their Lordships have to decide whether an enactment in such a form would be within the powers of the Provincial Legislature by reason of the taxation imposed by it being 'direct taxation within the province in order to the raising of a revenue for provincial purposes,' within the meaning of section 92 of The British North America Act, 1867. 'Direct taxation' is employed in that statute as defining the sphere of provincial legislation, and it became from that moment essential that the Courts should, for the purposes of that statute, ascertain and define the meaning of the phrase as used in such legislation.

"Their Lordships are of opinion that the decisions in *Attorney-General for Quebec v. Reed*, 10 A.C. 141; *Bank of Toronto v. Lamb*, 12 A.C. 575; and *Brewers & Maltsters' Association of Ontario v. Attorney-General for Ontario* (1897), A.C. 231, have established that the meaning to be attributed to the phrase 'direct taxation' in section 92 of The British North America Act, 1867, is substantially the definition contained in the treatise of John Stuart Mill, and that the question is no longer open to discussion.

"It remains to consider whether the succession duty imposed in the present case would be within this definition if it be taken that the duty is imposed on all the property of the testator wherever situate. The provisions of the Act leave much to be desired in respect of clearness. The definition of 'property' contained therein is admittedly too wide if it is intended to form a basis for provincial taxation, since it would include the movable property of any person who might be resident in the province at the time of his death, whether domiciled therein or not. But putting aside such considerations, the appellants not only admit, but contend, that the Act imposes a succession duty upon all movable property, wherever situated, of a testator domiciled in the province. The succession duty varies with the amount of the property and the degree of consanguinity of the persons to whom it is transmitted. The method of collection appears to be as follows:—There is nothing corresponding to probate in the English sense, but there is an obligation on 'every heir, universal legatee, legatee by general or particular title, executor, trustee and administrator or notary before whom a will has been executed', to forward, within a specified time, to the collector of provincial revenue a complete schedule of the estate, together with a declaration under oath setting forth various matters relating thereto. Although this is an obligation on each member of each of the above classes, it is provided that 'the declaration duly made by one of the above named persons relieves the others as regards such declaration.' On receipt of such declaration, the following provisions with regard to the payment of the duty come into force:—

(4) . . . . the said collector shall cause to be prepared a statement of the amount of the duties to be paid by the declarant.

(5) Such collector of provincial revenue shall inform the declarant of the amount due as aforesaid by registered letter mailed to his address, and notify him to pay the same within thirty days after the notice is sent; and, if the amount is not then paid to him on the day fixed, the collector of provincial revenue may sue for the recovery thereof before any Court of competent jurisdiction in his own district.

(6) No transfer of the properties of any estate or succession shall be valid, nor shall any title vest in any person, if the taxes payable under this section have not been paid, and no executor, trustee, administrator, curator, heir, or legatee shall consent to any transfers or payments of legacies, unless the said duties have been paid.

"Their Lordships can only construe these provisions as entitling the collector of inland revenue to collect the whole of the duties on the estate from the person making the declaration who may (and as we understand in most cases will) be the notary before whom the will is executed and who must recover the amount so paid from the assets of the estate, or, more accurately, from the persons interested therein.

"To determine whether such a duty comes within the definition of direct taxation, it is not only justifiable but obligatory to test it by examining ordinary cases which must arise under such legislation. Take, for instance, the case of movables such as bonds or shares in New York bequeathed to some other person not domiciled in the province. There is no accepted principle of international law to the effect that nations should recognise or enforce the fiscal laws of foreign countries, and there is no doubt that in such a case the legatee would, on duly proving the execution of the will, obtain possession and ownership of such securities after satisfying the demands, if any, of the fiscal laws of New York relating thereto. How, then, would the Provincial Government obtain the payment of the succession duty? It could only be from some one who was not intended himself to bear the burden but to be recouped by some one else. Such an impost appears to their Lordships plainly to lie outside the definition of direct taxation accepted by this Board in previous cases.

"Although the case just referred to is probably one of the most striking instances of the excess of these duties beyond the legal limits of the powers of the Provincial Legislature, it is by no means the only one. Indeed, the whole structure of the scheme of these succession duties depends



on a system of making one person pay duties which he is not intended to bear but to obtain from other persons. This is not in return for services rendered by the Government, as in the cases where the local probate has been necessary and fees have been charged in respect thereof. It is an instance of pure taxation, in which the payment is obtained from persons not intended to bear it, within the meaning of the accepted definition above referred to, and their Lordships are therefore compelled to hold that the taxation is not 'direct taxation,' and that the enactment is *ultra vires* on the part of the Provincial Government."

Subsequent to the finding of the Judicial Committee in the *Cotton* case, the succession duty enactments of other provinces were considered by the Courts in the light of that decision.

*In re Doe* (1914), 19 B.C. 536; 16 D.L.R. 740; 27 W.L.R. 803; 6 W.W.R. 510. This was an application by the executor of the will of E. H. R. Doe, deceased, for a direction to the Registrar of the Supreme Court to deliver to the applicant the Letters Probate of the will without first exacting payment or security for the payment of the amount due or payable under The British Columbia Succession Duty Act, R.S.B.C. 1911, Chapter 217. It was admitted that the property passing under the will was all within British Columbia. The application was based on the one contention only, namely, that even as to property within the province, the tax imposed by the Act was an indirect tax, and as such, not within provincial competence.

In holding against this contention, and that the decision in the *Cotton* case had no application to the British Columbia legislation, Clements, J., said: "I have carefully examined our own Act, and I find that the impost is laid expressly upon the property passing under the will (or the intestacy, as the case may be) and that there is apparently a studied effort to avoid laying any legal obligation to pay the duty upon any person or persons other than the beneficiaries; and even as to them the liability to pay is inferential, or arises under order of Court made in the course of

the enforcement of the charge upon the property. There seems little, if any, difference in principle between such a tax and the ordinary familiar municipal taxation of land. According to a certain school of economists a tax upon land is the most scientific form of indirect taxation, reaching ultimately and indirectly, as they claim, to all classes of society; but I have never heard of such a tax being held by any Court to be other than a most obvious example of direct taxation."

The finding of Clement, J., in this case was probably erroneous, having regard to the subsequent decision of the Privy Council in *Provincial Treasurer of Alberta v. Kerr* (1933), A.C. 710; 102 L.J.P.C. 137; 149 L.T. 563; 50 T.L.R. 6. P.C.; (1933), 4 D.L.R. 81

The British Columbia Succession Duty Act, R.S.B.C. 1911, Chapter 217, contained no clause excluding personal liability of an executor, and, having regard to sections 21 to 24 inclusive of that Act and to the form of bond prescribed, it would appear to follow that an executor who applied for Letters Probate did become personally liable for the amount of the duties determined by the Auditor-General, and was obliged to pay them or give security for their payment by a bond in the statutory form. In these circumstances, the conclusion appears to be inescapable that the taxation imposed by the Act was indirect and beyond the competence of the Provincial Legislature.

*In re Cust*, 8 A.L.R. 308; 21 D.L.R. 366; 30 W.L.R. 671; 7 W.W.R. 1286. An application was made to Mr. Justice Beck, of the Supreme Court of Alberta, by the executor of the will of the deceased, to determine whether the succession duty payable under the Succession Duties Ordinance then in force in respect of specific lands devised should be paid by the devisee or by the executors out of the residue. Upon the argument, the question of the validity of the Ordinance arose, and the learned Judge decided that it was *ultra vires* the Legislature, on the ground that the duties constituted indirect taxation. It was also held that, if the statute were not *ultra vires*, then as between the specific devisee and the

residuary beneficiary the specific devisee and the property devised to him were liable for the duty. The Attorney-General appealed from this decision to the Alberta Supreme Court, and the decision of the latter Court was that so far as it related to property within the province, the Ordinance provided a scheme of direct taxation, and that such taxation was *intra vires*.

Per Harvey, C.J.: "The reasoning (in *Rex v. Cotton*) does not, to my mind, apply to the Ordinance in question here. The plan of our Ordinance is entirely different from that (the Quebec statute). Instead of a person who has no claim to or interest in the estate being called on to pay the duties, they are payable by the executor or administrator, who is, under our law, the legal owner of all the estate, both real and personal, and whose duty it is to pay all the debts and other liabilities of the estate, not out of his own property, but out of the estate in his hands. As to duty in respect to property in the province, he has no need to go to anyone to recover the duties paid, because he pays them out of the property itself, which is directly liable. . . .

"The executor or administrator, before the grant of probate or administration, is required to give a bond for the payment of the duty (section 6), but it is limited to the payment 'of any duty to which the estate of the deceased coming into the hands of the said executor or administrator may be found liable.' This is the only personal liability that is imposed on the executor or administrator, and it is no more of a personal liability than is imposed by the bond to be given by an administrator before grant of administration to administer the estate according to law. . . .

"Under these provisions the duties appear to come within the definition of direct taxation as accepted in the *Cotton* case."

The decision of the Alberta Supreme Court in the case of *Re Cust* was directly overruled by the Judicial Committee in the judgment delivered by it in the *Kerr* case, *supra*. In the course of his judgment, Lord Thankerton says:—

"Reliance was placed in the Court below on the case of *Re Cust* (1915), 21 D.L.R. 366; 8 Alta. L.R. 308; but it will be clear from the views their Lordships have expressed as to the principle laid down by the cases of *Cotton* and *Alleyn*, that the decision of the Court which decided *Cust's* case on appeal was erroneous, and must be taken as overruled."

*In re Muir Estate; Standard Trusts Company v. Treasurer of Manitoba*, 51 Can. S.C.R. 428; (1915), 8 W.W.R. 1226; 23 D.L.R. 811; affirming 6 W.W.R. 995; 18 D.L.R. 144; 28 W.L.R. 358; 24 Man. L.R. 319. In the course of his judgment in this case, Cameron, J.A., makes reference to the Manitoba Succession Duty legislation as compared with that in force in the Province of Quebec when the *Cotton* case was decided. His observations are as follows:—

"Succession duties under our Act have been generally regarded as direct taxes. Those upon whom the succession devolves have been looked upon as those who have to pay them directly. The fact that the payment may be made temporarily, by the executor, has not been regarded as constituting a tax direct upon the executors, but indirect upon the devisees or others interested. The executor has been regarded merely as an agent in making the payment. The case of a corporation making a payment of an income tax and charging it against the dividends payable to parties ultimately liable seems analogous. In the one case, as in the other, there is no question that the method of payment is more or less indirect, but in neither case is the indirectness of the levy considered so substantial as to withdraw the taxes in question from the classification of direct taxes. . . .

"My conclusion, therefore, is that we must read the judgment in *Cotton v. Rex* in the light of the unusual provisions of the Quebec law therein referred to. The corresponding provisions of our law are simple and effective in carrying out what I have no doubt was the intention of the Legislature, that is, to make the tax payable directly by the parties beneficially interested in the estates of deceased persons. . . . The Act directly imposes the tax upon

the estate, or rather, upon the persons entitled thereto. The executor is utilised as the agent to collect from those entitled to the estate the duties and to pay the same to the treasury."

On the hearing of the appeal in the Supreme Court of Canada in *Re Muir Estate*, Davies, J., comments upon the decision of the Privy Council in *Cotton v. Rex* in the following terms: "To assume that by this judgment the Judicial Committee intended to reverse many previous decisions of the Board, which had held either expressly or by necessary implication that succession duty statutes properly framed and imposing taxes on movable or other property within the province were *intra vires* the legislatures which enacted them, would be unjustifiable."

It would appear that the foregoing judicial opinions expressed as to the validity of the Manitoba legislation in force in 1915 were erroneous. The Act contained no clause excluding personal liability of the executors, and was accordingly *ultra vires* on that ground. Indeed, section 15 made executors and administrators directly liable by providing that,—“An executor or administrator, except an official administrator, shall, before the issue of Letters Probate or Letters of administration, pay to the Provincial Treasurer the duty called for by this Act, or deliver to the Surrogate Court a bond in a penal sum equal to ten per centum of the sworn value of the property of the deceased person liable to succession duty.”

Legislation followed in the Province of Quebec upon the decision of the Privy Council in *Cotton v. The King*, and three statutes were passed on the 19th February, 1914—4 George V. ch. 9, 4 George V. ch. 10, and 4 George V. ch. 11. By the last mentioned statute it was enacted as follows:—

- (1) The intent and meaning of all the Acts of the Legislature imposing succession duties, was and is, that every person to whom property or any interest therein was transmitted owing to death, should pay to the Government directly, and without having a recourse against any other person, a tax calculated upon the value of the property so transmitted.

(2) There shall be no right of action for the recovery of any money heretofore or hereafter paid to the Government in respect of taxes or duties imposed by any Act of the Legislature relating to succession duties, for the reason only that the said taxes or duties were not direct taxes.

*Rex v. Burland* (1922), 1 App. Cas. 215; 91 L.J.P.C. 81; (1922), 1 W.W.R. 100; 62 D.L.R. 515; varying (1920), 1 W.W.R. 952; 60 S.C.R. 1; 46 Que. S.C. 430.

*Alleyn-Sharples v. Barthe* (1922), 1 App. Cas. 215; 91 L.J.P.C. 81; (1922), 1 W.W.R. 100; 62 D.L.R. 515; affirming 54 D.L.R. 89; 60 S.C.R. 1; (1920), 1 W.W.R. 952.

These were two appeals to the Judicial Committee of the Privy Council, the first being by the defendant, Burland, from a judgment of the Court of King's Bench of Quebec (Appeal side), and the second appeal being by the defendant, Alleyn-Sharples, from a judgment of the Supreme Court of Canada (60 S.C.R. 1; (1920), 1 W.W.R. 952) upon questions relating to succession duties. Burland's appeal was allowed with costs; Alleyn-Sharples's appeal was dismissed with costs.

The facts in the Burland appeal are as follows:—George Burland died on May 22, 1907, at and domiciled in Montreal, in the Province of Quebec, and appointed Jeffrey Hale Burland and Wm. M. Walbank, executors of his will and codicil. The said J. H. Burland was one of the universal legatees under the will, and he made the declaration required by article 1191g (1) of 6 Edw. VII., ch. 11, as to the value of the property owned by the deceased that was situate both within and without the province. He was accordingly required to pay a sum for succession duty on the whole estate by the deputy collector of provincial revenue and this amount was paid by the executors under protest.

On September 23, 1909, the executors preferred a petition of right claiming payment back of the duties paid in respect of the properties that were situate outside the province, and also further sums representing the higher rate at which property within the province had been taxed by reason of its being aggregated with that outside. The peti-

tion was partly heard by the Quebec Superior Court on July 20, 1911, but it was ordered that the proceedings should be suspended until the decision of the Supreme Court of Canada on the appeal taken from the decision in the case of *Cotton v. The King*. The case of *Cotton v. The King* ultimately came before the Judicial Committee of the Privy Council, who decided against the Crown. *Burland's* case then came again before the Quebec Superior Court on June 26, 1914, when the petition was dismissed, and on appeal to the Court of King's Bench this judgment was affirmed. The appeal to the Judicial Committee in *Burland's* case was brought from that decision and the judgment of their Lordships was delivered by Lord Phillimore, who said:

"So far as *Burland's* case is concerned, the relevant statute is that of 6 Edw. VII., ch. 11, amended by 7 Edw. VII., ch. 14. Art. 1191b enacted by section 1 of the former statute, provides that:—

" 'All transmissions, owing to death, of the property in, usufruct, or enjoyment of, movable or immovable property in the Province, shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death,' and by Art. 1191c the word 'property' is defined as follows:—

" 'The word "property," within the meaning of this section, shall include all property whether movable or immovable actually situate or owing within the Province, whether the deceased at the time of his death had his domicile within or without the Province, or whether the debt is payable within or without the Province, or whether the transmission takes place within or without the Province, and all movables, wherever situate, of persons having their domicile, or residing, in the Province of Quebec at the time of their death.'

"By 7 Edw. VII., ch. 14, assented to on March 14, 1907, Art. 1191b was amended by replacing the words 'in the Province' by the words 'as defined in Art. 1191c.'

"The first only of these two statutes was applicable in the case of *Cotton v. The King*, for Henry Cotton, whose estate was the subject of the dispute, had died December 26, 1906, domiciled in Montreal, and the question raised was whether or not the property outside the province was liable to the tax imposed by the statute of 6 Edw. VII., ch. 11. It was decided that the property was not so liable for two distinct reasons—the one that Art. 1191b of sec. 1, 6 Edw. VII., ch. 11, was the real taxing section, and imposed duties upon the movable property 'in the province'—the extended meaning given to the word 'property' in Art. 1191c, being held by the Board to be insufficient to bring the property outside the province within the operation of the tax expressly imposed by the earlier section on property within the province. Had the decision rested only on this ground, it would have provided little help toward reaching a right conclusion in *Burland's* case, as the subsequent statute 7 Edw. VII., ch. 14, struck at the root of this part of the decision by deliberately incorporating the definition in the taxing articles. But there was a further and wholly independent ground of decision, and that was that by Art. 1191g, the tax might be payable in the first instance by a class of persons who recouped themselves for the payment from the legatees; and, therefore, in accordance with a distinction between direct and indirect taxation traceable to a definition given by John Stuart Mill, and acted upon by the Board in the cases of *Atty.-Gen. for Quebec v. Reed*, 10 App. Cas. 141; 54 L.J.P.C. 12; *Bank of Toronto v. Lambe*, 12 App. Cas. 575; 56 L.J.P.C. 87; and *Brewers' and Maltsters' Assn. of Ontario v. Atty.-Gen. for Ontario* (1897), A.C. 231; 66 L.J.P.C. 34; the taxation was held to be indirect and outside the power of the province.

"In the course of the judgment of the Board it was stated that the provisions of the statute entitled the collector of inland revenue:—

"to collect the whole of the duties on the estate from the person making the declaration, who may (and, as we understand, in most cases will) be the notary before whom



the will is executed and who must recover the amount so paid from the assets of the estate, or, more accurately, from the person interested therein.'

"Now the statute, though mentioning the notary, exempts him from obligations to transmit the declaration, and consequently from the liability to pay, which by section 3 is imposed on the declarant; but it appears from the report that their Lordships were informed that in point of practice the notary frequently did make the declaration himself and so bring himself within the provisions of the statute. It is now stated that this information was not accurate and that it is not a common practice for the notary to make the declaration, if indeed, he ever makes it, and so, the illustration from the case of the notary cannot be taken to have been a reliable one. But the principle remains the same and could equally well have been illustrated by the cases of the executor, or administrator, or legatee by a particular title. The error does not affect the force of the decision, though their Lordships have thought it right to make this explanation, as it has evidently given rise to misunderstanding in the province.

"Unless, therefore, the case can be distinguished, it completely covers the appeal in *Burland's* case. The respondent tries to escape down two avenues of reasoning: the one that the point was not necessary for the decision in *Cotton's* case, which had already been determined by other independent considerations, and the other that subsequent legislation made retrospective removes the protection which *Cotton's* case affords. As to the first, the road is not open. The decision that the statute was *ultra vires* was in no sense a wayside dictum; it was just as complete and fundamental as the decision that bore on the construction of the statute; the words used in the judgment itself make this clear. After stating the nature of the two questions, it continues in these words:

" 'These are the two questions which this Board has to resolve, and though it may well be that the decision of one of these questions in favour of the appellants might render

it unnecessary to decide the other, their Lordships are of opinion that they are of co-ordinate importance in the case, and that they should base their judgment equally on the answers to be given to the one and to the other.'

"As to the second, the position is less clear. Legislation following swiftly upon the decision of *Cotton v. The King*, and three statutes—4 Geo. V., ch. 9; 4 Geo. V., ch. 10; and 4 Geo. V., ch. 11—received the royal assent on February 19, 1914. They will need examination in *Sharple's* appeal, but so far as *Burland's* case is concerned the critical statute is 4 Geo. V., ch. 11, as in each of the other two statutes there is a provision that, so far as regards property transmitted before the passing of the statute, they only apply where the taxes previously imposed remained unpaid. The statute 4 Geo. V., ch. 11, after reference to the mistake in the case of *Cotton v. The King*, and a series of recitals which make it obvious that the purpose of the Act is as far as possible to remedy the provisions of former statutes which had led to the decision and to prevent the inequalities which might arise as between those who had paid and those who had not paid the taxes declared by *Cotton's* case to be unlawfully imposed, enacted that

"The intent and meaning of all the Acts of the Legislature imposing succession duties, was and is, that every person to whom property or any interest therein was transmitted owing to death, should pay to the Government directly, and without having a recourse against any other person, a tax calculated upon the value of the property so transferred'; and after provision to prevent action for recovery of taxes paid on the ground that such taxes were not direct provided by section 3 that "This Act shall not apply to pending or decided cases.'

"The question, therefore, is whether *Burland's* case was a 'pending case' within the meaning of section 3. *Lernieux, C.J.*, regarded the point as closed to the appellants, as they had in fact paid taxes on the property within the province, and did not ask for their repayment.

"It is undoubtedly the fact that the appellants in *Burland's* appeal did not raise in express terms the ground of the taxation being indirect and base their relief on this contention, but they stated that the Government had no right to charge taxes on property outside the province, and that the laws and statutes which authorised the Government to raise such taxes were *ultra vires* and of no effect. This was the exact position in the case of *Cotton v. The King*; there also the claim was only for repayment of the taxes on the extra-territorial property, and the claim was in similar words, but the fact that the authority to pass the law was challenged, though only associated with a limited relief and a special cause, was regarded as sufficient to compel the Board to consider the question of *ultra vires* in its widest application and not to bind themselves to consider only the one assigned reason of invalidity. According to the rules of pleading, an allegation of infirmity in any statute on the ground of *ultra vires* is sufficient without assigning further reasons.

"Their Lordships cannot, therefore, agree with Lemieux, C.J., and equally they differ from Archambeault, C.J., Lavergne, J., and Carroll, J. The first of these learned Judges bases his judgment, not indeed on the ground of admission of liability, but on that of defect in the pleadings. Carroll, J., appears to regard the reservation as inoperative, and no reasons were filed by Lavergne, J. Pelletier, J., who differed, does not deal with the effect of the statute 4 Geo. V., ch. 11, and Cross, J., the other learned Judge who dissented, assigned no reasons.

"Their Lordships think that *Burland's* appeal was a pending case within the meaning of section 3. It was a case in which the claim for repayment was being made and the validity of the statute was in issue.

"This being so, the case cannot be distinguished from *Cotton v. The King*, and the appeal must be allowed and the judgments of the two Courts below set aside and the judgment entered for the appellants with costs here and

in those Courts, and they will so humbly advise His Majesty."

**Alleyn-Sharples v. Barthe.**

The Hon. J. Sharples died on July 30, 1913, domiciled in Quebec. He appointed Dame Margaret Alleyn-Sharples his universal legatee and executrix of his will jointly with two other parties. In October, 1913, the executors lodged their declaration enumerating the property of the deceased and including therein shares in various companies whose head offices were outside the Province of Quebec. The claim was made for duties in respect of the whole estate. This claim, so far as it related to the property outside the Province, was resisted and proceedings were instituted in August, 1915, by the collector of revenue against the executors to recover payment.

Chief Justice Lemieux, by whom the action was tried in the Quebec Superior Court, decided against the executors, acting upon and applying the well known rule *mobilia sequuntur personam*.

This judgment was reversed, on appeal to the King's Bench, in a majority judgment of that Court, which held that the powers of the Provincial Legislature were not plenary but limited to direct taxation within the province, and that any attempt to levy a tax on property locally situate outside the province was not taxation within the province and was beyond the competence of the Provincial Legislature.

On appeal to the Supreme Court of Canada, decision was given by that Court against the executors, and on further appeal to the Privy Council the finding of the Supreme Court of Canada was sustained.

The judgment of the Privy Council was delivered by Lord Phillimore, who stated, *inter alia*, as follows:

"The statute 4 Geo. V., ch. 9, provides by Art. 1375 that all property movable or immovable, the ownership, usufruct or enjoyment whereof, is transmitted owing to

death, shall be liable to certain taxes calculated upon the value of the transmitted property. Art. 1376 says that the word 'property' included all property movable or immovable actually situate within the province, and that whether the deceased was domiciled within or without, or the transmission took place within or without: an exemption was given by Art. 1380 to a notary, executor, trustee or administrator from personal liability for the duties imposed. This, as will be seen, does not affect movable property outside the province, and of course does not touch the property in the present instance; but by 4 Geo. V., ch. 10, it is expressly provided by Art. 1387b that:

**1387b.** All transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province at the time of such death, shall be liable to the following taxes calculated upon the value of the property so transmitted, after deducting debts and charges as hereinafter mentioned.

and by Art. 1387g, it is provided that the person to whom as heir, universal legatee, legatee by general or particular title, or donee under a gift in contemplation of death, movable property outside the province is transmitted, is personally liable for the duties in respect of such properties, and no more; and concludes:

"No notary, executor, trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or the money in his possession belonging or owing to the beneficiaries, and if he fails so to do may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only."

"These statutes have effectively met the difficulty which was pointed out in the case of *Cotton v. Reg.* as to the taxation imposed by the earlier statutes being indirect, and it only remains to be considered whether the taxation is within the province. For this purpose 4 Geo. V., ch. 10,

is the relevant statute. The conditions there stated upon which taxation attaches to property outside the province are two: (1) That the transmission must be within the province, and (2) That it must be due to the death of a person domiciled within the province. The first of these conditions can, in their Lordships' opinion, only be satisfied if the person to whom the property is transmitted is as the universal legatee in this case was, either domiciled or ordinarily resident within the province; for in the connection in which the words are found no other meaning can be attached to the words 'within the province' which modify and limit the word 'transmission.' So regarded the taxation is clearly within the powers of the province. It is, however, pointed out that Art. 1387g refers to 'every person' to whom movable property outside the province is transmitted as liable for the duty, but this must refer to every person on whom the duties are imposed, and those persons are, as has already been shown, persons within the province. On this construction the statute is clearly within the powers conferred by The B.N.A. Act, and the taxes in dispute were rightly claimed."

*Erie Beach Co., Ltd. v. Attorney-General for Ontario* (1930), A.C. 161; 99 L.J.P.C. 38; 142 L.T. 156; 46 T.L.R. 33, P.C.; (1930), 1 D.L.R. 859. In this case the question arose as to whether section 10 of the Ontario Succession Duty Act, R.S.O. 1914, ch. 24, imposing liability not upon succession to shares, but upon the corporation in which the shares exist, without the accrual of any successory interest in them to the company, was or was not indirect taxation and so beyond the legislative powers of the province. Certain shares in the appellant company, which was registered in Ontario, were registered in the name of a person domiciled in the State of New York. By section 10(2) of the Ontario Succession Duty Act it was provided that "No property in Ontario belonging to any deceased person at the time of his death . . . whether such deceased person was at the time of his death domiciled in Ontario or elsewhere shall be transferred . . . until the duty, if any, is paid,

or security given therefor, and any corporation or person allowing such property to be so transferred . . . contrary to this subsection shall be liable for such duty." It was held that, on the death of the shareholder, as there was no provision for reimbursement of the company the statute did not impose indirect taxation and was not *ultra vires* of the Legislature. It was also held that, as the company's share register was required by law to be kept in Ontario and as the shares could therefore be effectively dealt with only in Ontario, the shares were situate in Ontario and subject to succession duty there.

*Provincial Treasurer of Alberta v. Kerr* (1933), A.C. 710; 102 L.J.P.C. 137; 149 L.T. 563; 50 T.L.R. 6, P.C.; (1933), 4 D.L.R. 81. Isaac Kendall Kerr died on the 3rd December, 1929, domiciled and resident in the Province of Alberta. He left a large estate, and the respondents in the original appeal obtained Letters Probate as executrix and executor of his will. Succession Duties amounting to \$54,754.21 were assessed under the Alberta Succession Duty Act, 1932, ch. 16, by the Provincial Treasurer in respect of the property of the deceased, and the respondents, along with a surety, entered into a bond to secure payment of these duties. The respondents challenged the validity of the imposition of the duties (a) as not being direct taxation, and (b) as not being taxation within the province. The Judicial Committee upheld these contentions, and ruled that the Act was *ultra vires*. Lord Thankerton, who delivered the judgment, referred to the indirect character of the legislation in the following terms:

"The Alberta Succession Duties Act contains no clause similar to the provision contained in Art. 1387g of the Quebec Act excluding personal liability of an executor, etc., and, in their Lordships' opinion, it is clear, under sections 11 and 12 of the Act, that an executor who applies for probate becomes personally liable for the amount of the duties determined by the Provincial Treasurer, and must either pay them or give security for their payment by a

bond in the statutory form, and, further, that under the terms of the bond the executor is personally liable for payment of the duties in respect of any of the property coming into his hands. It follows that the taxation is indirect and beyond the competency of the Province."

## 2. Taxation "Within the Province".

In the *Cotton* case and in subsequent succession duty cases until the finding of the Judicial Committee was handed down in *Provincial Treasurer of Alberta v. Kerr*, *supra*, the phrase chiefly discussed was "direct taxation". Little attention had hitherto been given to the exact meaning and scope of the words "within the province" in relation to succession duty legislation. Generally speaking, taxation is imposed on persons, and the incidence of the tax upon persons was the particular feature of the Quebec legislation which led the Privy Council in the *Cotton* case to decide that the impost was indirect. At the opposite extreme to personal taxes are those that are imposed on property.

In nearly all cases before the Privy Council a property tax, charged upon and payable out of the property, has been regarded as a customary and proper method of taxation. See, for example, *Rex v. Lovitt* (1912), A.C. 212; 81 L.J.P.C. 140; reversing 43 S.C.R. 106; where Lord Robson describes the tax then existing in New Brunswick in the following terms, namely:

"Although called a succession duty, the tax here in question was laid on the corpus of the property, and the statute made its payment a term of the grant of ancillary probate. By section 6 the executor is required to give a bond for its due payment, and if he fails to do so the probate granted to him is cancelled. He is directed to deduct the duty before handing over the property; to pay it forthwith to the Receiver-General of the province; and if a foreign executor transfers the stock of any company in the province liable to duty, on which the duty has not been paid, he is to pay it, and the company permitting such transfer shall also become liable.



"These provisions shew that the Act under consideration assimilates the tax to the probate duty. It is imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province, and, in the view of their Lordships, it is intended to be a direct burden on that property, varying in amount according to the relation of the successor to the testator."

Even although a tax may be imposed upon property, and made payable out of such property, it is difficult to regard such a tax as entirely divorced from the matter of personal liability for its payment. In *Provincial Treasurer of Alberta v. Kerr, supra*, the Judicial Committee says that "It is at least unusual to find a tax imposed on property and not on persons." If property is clearly made the subject of taxation, however, and if such property is situated within the province, then the place of residence of the person accountable for the tax is not material.

It is equally true, on the other hand, that if a person is found within a province, he may be taxed there: *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 141; 56 L.J.P.C. 87; 57 L.T. 377; 3 T.L.R. 742, P.C.

Again, the transmission of property within the province may be validly taxed: *Alleyn-Sharple v. Barthe, supra*. It has been suggested that the word "transmission" as used in the Quebec legislation, and in the legislation of some of the other provinces, is synonymous with the word "succession", as that expression is used in the English Succession Duty Act, 1853. There are strong reasons for concluding that this view is not justified. In *Attorney-General of Ontario v. Baby* (1927), 1 D.L.R. 1105; 60 O.L.R. 1; affg. (1926), 3 D.L.R. 928; 59 O.L.R. 181; Hodgins, J.A., says: "The language of that section needs careful consideration. The words imposing the tax include both a direct tax on property passing on death, and, in the alternative, on 'in respect of any succession'. Now, 'succession' is defined in the Act, by section 3, as being something which is conferred on a person upon a death by reason of a past or present

disposition of property, or by any devolution by law by reason whereof such person becomes beneficially entitled. These words 'in respect of any succession' therefore mean in respect to something conferred upon a person upon the death of another, arising out of or depending upon a disposition of property or on the general law, apart from individual disposition, and designated by the statute as a 'succession'. To my mind this legislation deals with something possibly different from, and perhaps less than, what is described by the word 'transmission'. That expression involves a handing over or a passing on of something from one to another, and so may include the means by which that is done—in other words, the instrument of its title or its confirmation and effect. The words here used seem to denote merely the accession of a title or right in the person benefited, by which a benefit accrues to him. It does not necessarily include the perfecting of his title by an instrument or by the intervention of a Court or other authority. It is the initial right residing in him to have all this done that is here taxed."

Assuming that the expressions "transmission" and "succession" are not synonymous, the question arises: Can a provincial legislature impose a tax upon or in respect to the succession to all the movable or personal property of a domiciled decedent? The issue in this form has not yet been directly raised before the Privy Council, although it has been asserted that certain observations made by Lord Thankerton, when delivering judgment in the *Kerr* case, *supra*, give support to the view that the question should be answered in the negative. On the other hand, several members of the judiciary in Canada have expressed opinions in favour of the validity of this mode of taxation. See, for example, the judgment of Duff, J. (now Chief Justice of the Supreme Court of Canada), in *The King v. Cotton*, 1 D.L.R. 398, at pages 419 *et seq.*, and in *Alleyne-Sharples v. Barthe* (1920), 1 W.W.R. 952, at pp. 965 *et seq.*

The decisions of the Judicial Committee and of the Supreme Court of Canada, and the opinions thus expressed

by members of the latter Court, on the constitutional aspects of the law, indicate that the following duties may be validly imposed by Provincial Legislatures and constitute direct taxation within the province:—

(1) A duty or tax in the nature of a probate or estate tax upon real and personal property locally situate within the taxing province, irrespective of the domicile of the deceased owner, where the tax is imposed as a condition of the grant of local probate or administration;

(2) A duty or tax on the transmission of property to a resident beneficiary, on the death of a person domiciled in the taxing province at the time of death, notwithstanding that the property may be locally situated outside of the province at the time of the death; and

(3) A succession or legacy duty upon or in respect of the succession to all the personal property of a deceased person dying domiciled within the province imposing the tax, as a condition upon or as an incident of the accession to the benefits of the succession.

### **Probate or Estate Duties.**

The use of the phrase "succession duties" in the title of most of the provincial enactments has led to a more or less general belief that the object of such taxation is, in all cases, merely to impose a duty or tax upon legacies or successions payable to or devolving upon the beneficiaries of the estates of domiciled decedents. There is abundant evidence in the provincial laws, however, that the taxation is intended to be much wider in its application, and to include a tax upon property situated in the province forming part of the estates of deceased persons dying domiciled outside of the province. The tax upon such property is in the nature of a probate or estate duty. Moreover, in nearly all the provincial statutes provision has been made for extending the tax beyond estate property strictly so called and including properties otherwise deemed to pass on the death.

Duff, J. (now C.J.C.), in delivering judgment in the *Cotton* case, refers to the dual principles embodied in certain of the statutes in these terms:—

“There is certainly nothing in The British North America Act pointing to the conclusion that a Canadian province is confined to either one or the other of these principles of taxation. One province may adopt that which gives special prominence to the circumstance that the succession is regulated by the law of the domicile, another to the fact that the title to the particular items of movable property is controlled by the law of the situs. Toll may be exacted as an incident of the accrual of the benefit, or as a condition of the passing of the title. And since either may be validly acted upon to the exclusion of the other, I do not see upon what ground it can be said that both principles may not be brought, so to speak, under the same roof and combined in a single system. The decision of the Judicial Committee in *Lovitt v. The King* (1912), A.C. 212, appears to support this view.”

In *Lovitt v. The King* (1912), A.C. 212; 81 L.J.P.C. 140; Lord Robson refers to the object of the New Brunswick Succession Duty Act, 1896, in the following terms:—

“Broadly stated, section 5 (sub-secs. 1 and 2), seeks to bring within the scope of succession duty:

- “(a) All property situate within the province, whether the deceased was domiciled there or not;
- “(b) All property outside the province belonging to persons domiciled therein; and
- “(c) Even all property outside the province belonging to persons not domiciled therein, if such property be devised to a person resident therein.”

In the *Lovitt* case, the Privy Council held that the New Brunswick statute, in imposing a duty upon all property situate within the province, whether the deceased was domiciled there or not, assimilated the tax to a probate duty, and that the taxation was *intra vires* of the Provincial

Legislature. The features of the legislation which led Lord Robson to regard it as imposing a tax in the nature of a probate duty were as follows:—

1. Duty laid on the corpus of the property;
2. Payment thereof made a term of the grant of ancillary probate;
3. Executor required to give bond for due payment, and, in default of so doing, probate to be cancelled;
4. Executor required to deduct duty before handing over property, and to pay it forthwith to the Receiver-General of the province;
5. Foreign executor prohibited from transferring the stock of any company in the province liable to duty, such executor, and any company permitting a transfer, to be personally liable in the event of transfer being made prior to actual payment of the duty.

On the basis of this decision of the Privy Council, it would appear to follow that if the legislation now in force in any of the provinces contains features similar to those outlined above, such legislation may be regarded as imposing taxation in the nature of a probate duty, and, to quote Lord Robson, "as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province."

### Transmission Duties.

The transmission of the property of deceased persons is the basis of much of the Quebec legislation on the subject of death duties. Subsequent to the decision of the Privy Council in *Provincial Treasurer of Alberta v. Kerr, supra*, the Provinces of Ontario and British Columbia also adopted this mode of taxation. The cases thus far decided on the subject of the taxation of transmissions throw little light on the question as to how far a tax of this character is valid and the extent to which it will be found capable of practical administration. The only Quebec decision on the

subject is *Alleyn-Sharple v. Barthe*, *supra*, in which Lord Phillimore interpreted 4 Geo. V., ch. 10, in the following manner, namely:—

“The conditions there stated upon which the taxation attaches to property outside the province are two: (1) That the transmission must be within the province, and (2) That it must be due to the death of a person domiciled within the province. The first of these conditions can, in their Lordships’ opinion, only be satisfied if the person to whom the property is transmitted is, as the universal legatee in this case was, either domiciled or ordinarily resident within the province; for in the connection in which the words are found no other meaning can be attached to the words ‘within the province’ which modify and limit the word ‘transmission’. So regarded, the taxation is clearly within the powers of the province.”

In the *Alleyn-Sharple* case, the deceased had bequeathed his entire estate to one beneficiary, Dame Margaret Alleyn-Sharple, who was resident and domiciled in the Province of Quebec. It is not a difficult matter to understand how a tax upon transmissions within the province would reach a beneficiary of this description. Cases of sole or universal benefits, however, are somewhat exceptional, and, assuming that legislation of this type is intended to embrace all benefits accruing or arising by reason of the death of a domiciled decedent, the question arises:

What is meant by the expression “transmission within the province” in relation to benefits passing on the death of domiciled decedents, other than sole or universal benefits, and particularly in relation to residuary bequests, where there are several beneficiaries interested in the distribution, some of whom reside within and some without the taxing province?

As to these classes of beneficiaries, the administration of the tax may be found to be a matter of some difficulty in view of the application of the principle of strict construction of taxing enactments. *In re Bennett, Provincial Treas-*

urer v. Bennett (1936), 2 D.L.R. 291, Robson, J.A., makes reference to this difficulty in the following terms:— "But, leaving that aside, the expected acquisitions of the beneficiaries are not ascertained yet, let alone passed to them as far as we know. As far as they are concerned, there may be nothing to tax yet. See *Lord Sudeley v. Attorney-General* (1897), A.C. 11; *Barnardo's Homes v. Special Income Tax Commissioners* (1921), 2 A.C. 1."

### Succession and Legacy Duties.

In *Cotton v. The King*, *supra*, the Quebec legislation then in force was successfully challenged as imposing indirect taxation, the scheme of the Act being to make the executor or administrator of a decedent personally liable for the duty, and thereby compelling him to recoup himself out of the assets of the estate, or from the beneficiaries.

Subsequent to the decision in this case, most of the provincial enactments were so amended as to make the payment of the duties a personal liability on the beneficiaries, thereby overcoming the indirect character of the law previously in force.

In more recent years the attacks upon succession duty legislation have centred, not so much upon the indirect features of the tax, as upon its alleged failure to come within the category of "taxation within the province". In the case of *Provincial Treasurer of Alberta v. Kerr*, *supra*, the Judicial Committee held that the Alberta Succession Duties Act, 1932, was *ultra vires* on this ground, as well as upon the ground that the tax thereby imposed was indirect in character. It has been asserted that, as a result of this decision, the Provincial Legislatures cannot impose taxation upon or in respect of legacies and successions, in the sense as understood under the English Succession Duty Act, 1853. Before examining the accuracy or otherwise of this assertion, it is considered desirable at the outset to make some inquiry as to the nature of legacy and succession duties, and their distinguishing characteristics as compared with estate and probate duties. These characteristics are

set forth in the judgments delivered in *Winans v. Attorney-General* (1910), A.C. 27; 79 L.J.K.B. 156; 101 L.T. 754; 26 T.L.R. 133. In that case, the Lord Chancellor (Lord Loreburn) comments upon the subject in these terms:

“Legacy and succession duties fall upon the benefits received by survivors on their accession upon the death of a deceased. Estate duty falls upon the property passing upon the death of the deceased, apart from its destination.”

Lord Atkinson, in his judgment, says:

“Legacy and succession duties are taxes on the enjoyment of and succession to property. The Acts imposing them operate upon and have regard to the persons to whom on the death of the deceased owner the property belonging to him is carried—on whom it devolves—who are thenceforth entitled to enjoy it.”

Per Lord Gorell:

“The personal property is distributed according to the law of the domicile, and those who benefit receive their benefits according to that law. The duties imposed by these statutes in the case of a person dying domiciled in this country are in substance charged against the persons taking the benefits, and the duties vary with the persons benefited.”

Per Lord Shaw:

“These duties are duties upon the accession to property by legatees and successors, and the levy of them is, in my opinion, an incident of such accession, meant to have been governed under the law of the domicile of the deceased which regulates the distribution of his personal estate. Estate duty is of a different character: the levy and payment thereof occur not at the point of accession to property, but of the passing of property by the death of a testator.”

In *Wallace v. Attorney-General* (1865), 1 Ch. App. 1; 35 L.J. Ch. 124; 13 L.T. 480; 14 W.R. 116; it was held that the duties imposed by the English Succession Duty



Act, 1853, are imposed only on those who claim title by virtue of the law of the domicile. The effect of this decision is that in England succession duties, in the sense as understood under the Act of 1853, can only be imposed where the deceased died domiciled in England and where the beneficiaries claim title by virtue of the English law.

In the course of his judgment in this case, Cranworth, L.C., refers to the serious inconveniences which would result if legacies or successions arising under a foreign will were subjected to taxation. His observations in this connection are as follows:—

“The question, therefore, is, whether, when a person domiciled abroad makes a will giving personal property in this country by way of legacy, the legatee is a person becoming entitled to that property within the true intent and meaning of the 2nd section. I think not. I think that, in order to be brought within that section, he must be a person who becomes entitled by virtue of the laws of this country; any wider construction would give rise to difficulties hardly to be surmounted. In collecting the duties, the officers of the revenue will in general find no difficulty, supposing the duties to be imposed only on persons entitled under our own laws. The officers know, or must be supposed to know, what these laws are with respect to the persons liable by our laws to the duties to be levied. But who the parties entitled under a foreign will are, is a question which no knowledge of our laws will enable them to solve. It can only be ascertained by evidence in every case, shewing what the foreign law is, and who are entitled under it. In some cases this may admit of little or no doubt, but in others it may be a matter of great difficulty, and in no case can the officers safely act until the rights of parties have been ascertained litigiously. But even when it is ascertained who the parties entitled are, it by no means follows that the amount of duty payable would be known. I will put this case—Suppose a French father, dying and leaving an illegitimate child, having recognized him, in the mode prescribed by the French Code, so as to give him the status

of a legitimate child. To what duty is that child to be liable? It is hardly reasonable to say that he is to be ascertained by the French law as being entitled to some, and in certain cases to all, the rights of a legitimate child, and yet that we are to treat him for purposes of duty as a mere stranger. But the difficulties do not end here. Suppose that there are assets to the amount of \$10,000 in France, and to the same amount in England, and that there are debts in France to the amount of \$10,000. The whole of the French assets will be exhausted in payment of debts, so that the quantum of assets in this country would afford no sure criterion of the amount of duty payable, even if it were payable at all, for in such a case justice would require that the debts should be marshalled so as to attribute a fair proportion to the assets of each country. No correct conclusion could be arrived at as to the ultimate surplus on which duty would be payable, till an account had been taken of the French assets and of the debts which had been paid out of them, an account at which we should have no certain means of arriving. But suppose, on the contrary, that there were no debts in France, but debts in this country exhausting the funds here. The executor here paying, as he must pay, all his assets in discharge of debts, could not possibly enforce any claim against the French assets for duty on the surplus there, which his payments in England had left free to the legatees. These are all difficulties on the surface, and probably many more may be discovered by further investigation. The consideration of them has satisfied me that the only safe way of solving this question is that adopted with respect to legacy duty, namely, to consider the duty as imposed only on those who claim title by virtue of our laws. . . . Parliament has, no doubt, the power of taxing the succession of foreigners to their personal property in this country. But I can hardly think we ought to presume such an intention, unless it is clearly stated."

It will be observed that in this judgment, Cranworth, L.C., refers to two types of taxation upon succession as

being possible in England, where the taxing power is plenary, namely:—

(1) A tax upon legacies and successions arising on the death of persons dying domiciled in England such as that imposed by the Act of 1853; and

(2) A tax upon the succession of foreigners to personal property in England and forming part of the estates of persons dying domiciled elsewhere than in England.

As to the second type of taxation, His Lordship says that any intention to impose such a tax should be clearly stated, thereby suggesting that in his view a tax of this character would be somewhat unusual. Moreover, such a tax would obviously be subject to all the administrative inconveniences to which reference is made in the judgment.

The powers of Provincial Legislatures being limited to direct taxation within the province, the question may be asked, can such Legislatures impose taxation of the types above mentioned?

The taxation of successions to property found in a province, and forming part of the estates of persons dying domiciled elsewhere, would appear to be beyond the powers of a Provincial Legislature, having regard to the decision of the Privy Council in *Lambe v. Manuel* (1903), A.C. 68; 72 L.J.P.C. 17.

With regard to the powers of the provinces to impose taxation upon or in respect of the succession to the property of a domiciled decedent, irrespective of the location of such property, in the sense as understood under the English Succession Duty Act, 1853, divergent views have been expressed.

On the one hand, it has been suggested that when it is said in The British North America Act that the subject of the taxation must be within the province what is meant is that the person upon whom, or the property upon which, the tax is imposed must be within the province. It has also been contended that a succession or transmission is merely

a transaction or act of the law by which property is transmitted from the decedent to the beneficiary, and cannot itself be the subject of taxation. The acceptance of these views would involve the result that legacies and successions arising under the wills of domiciled decedents could not be taxed by the province of the domicile in circumstances where the assets of the deceased consist wholly of extra-territorial movables, and the beneficiaries are resident out of the province.

It has been contended, on the other hand, that authority to impose duties upon or in respect of the benefits acquired under a succession on the death of a domiciled decedent was possessed by the provinces before Confederation, notwithstanding that the succession comprised in part extra-territorial movables, and that this authority has not been abrogated by the provisions of The British North America Act.

The question has not yet been directly dealt with by the Privy Council, and it is considered that the finding in the *Kerr* case, *supra*, has no bearing upon its solution. That case concerned an Alberta statute which imposed a tax upon property situate outside the province, and did not in any way attempt to tax the succession.

Duff, C.J.C., favours the view that the provinces have the right to impose taxation upon or in respect of the succession. In *Cotton v. The King*, 1 D.L.R. 398, at pp. 419, *et seq.*, he deals with the subject in the following terms:—

“It is a principle now generally recognized in countries where either the common law or the civil law prevails that as regards movables (wherever they may be situate in fact) a testate or intestate succession is for many purposes considered as an integer devolving under and governed by a single law—namely, that which was the personal law of the decedent at the time of his death.

“The principle is recognized by Arts. 6, 599 and 600 of the Civil Code of Quebec, the latter of which in effect adopts

in this connection the English rule that the 'personal law' is the law of the territory in which the *decurus* had his domicile.

"This principle has never, by the law of England at all events, been regarded as excluding the authority of the law of the *situs* in respect of the particular movable items comprised in a succession; but it does involve the regulation by the law of the domicile of the distribution of the beneficial surplus belonging to the succession after the satisfaction of such claims as debts and expenses of administration. By that law then is determined the extent to which the property is subject to testamentary disposition and the conditions upon which the beneficiaries become entitled to accede to a share of the estate through such disposition or by operation of law; and among the generally recognized logical consequences of this principle (preserved by the maxim *mobilia ossibus inhaerent*) is that the legislative authority of the domicile is acting within its proper sphere in assuming for public purposes a share of the surplus as a toll exacted from the beneficiaries by way of condition upon or as an incident of the accession to the benefits of the transmission. Von Bar, Conflict of Laws, 2nd ed., pp. 254, 255; Wharton, Conflict of Laws, 3rd ed., pp. 183, 184, 185; Dicey, Conflict of Laws, 2nd ed., pp. 751, 752, 753; *Eidman v. Martinez*, 184 U.S. at 591; *State of Maryland v. Dalrymple*, 3 L.R.A. 372, at p. 374; West Inheritance Tax.

"In the fiscal legislation of the United Kingdom these principles have for nearly a century had full play. The enactments of the statute (55 Geo. III., ch. 184) imposing legacy duty were expressed in general terms comprehensive enough in themselves to apply to all persons and to all bequests of or payable out of personal property wherever situate. It was held in a well-known series of cases that the statute must be construed in accordance with the principle expressed in the maxim quoted above.

"Nobody doubts, of course, the competence of the Imperial Parliament to pass legislation obligatory upon the Courts of the Empire professing directly to affect property

situate in foreign countries whatever the ownership under which it is held. But there are certain recognized principles of international conduct which the Courts of the Empire in the absence of a clear indication to the contrary will assume Parliament has not disregarded.

"It was in these cases considered to be no infringement of these rules that Parliament should impose legacy duties in respect of a succession composed in part of movables having an actual *situs* in a foreign country, provided the decedent had at the time of his death a domicile within the United Kingdom. This restriction of the duty to the estates of persons so domiciled was sufficient, as Lord Herschell said in *Colquhoun v. Brooks*, 14 A.C. 493, at p. 503, to 'bring the matter dealt with within our territorial jurisdiction.'

"In this recognition of the law of the domicile in the matter of successions no distinction has been drawn between the legislative authority of a colony invested with power of self government or of a state or province which is a member of a Federation, and that of a Parliament exercising or possessing unrestricted sovereign powers. In the numerous cases which have come before the Privy Council from the Australasian colonies touching the scope of enactments imposing death duties the constitutional competence of the Legislatures of those colonies to proceed on the principle *mobilia sequuntur personam* seems never to have been doubted. *Harding v. Commissioners of Stamps for Queensland* (1898), A.C. 769. Indeed, as Mr. Dicey has pointed out, since the Treaty of Independence with the American Colonies in 1783, the policy of the Parliament of the United Kingdom has been to treat the colonies as in the matter of such taxation possessing fiscal independence. In the United States, it is perhaps superfluous to observe, in this respect the several States have been regarded as exercising an independent sovereignty.

"Is the taxing authority of a province of Canada affected by any restriction which makes such a province incompetent to apply these principles in framing its plan of taxation in respect of succession? Nobody can doubt that prior

to Confederation the Province of Nova Scotia (let us say) possessed such authority. How far then was this authority curtailed by The British North America Act?

"The subject of taxation was not under the Act exclusively assigned as a domain of legislation to either the Dominion or the Provinces. The Dominion in that field is given unrestricted authority: the provinces have a concurrent but more limited authority. The scope of this provincial authority is defined by the words 'Direct taxation within the province for the raising of a revenue for provincial purposes.' In this case we are concerned only with the condition that the taxation shall be 'within the province'.

"The point for consideration then is this: Was the authority (which the provinces unquestionably possessed before Confederation) to impose duties upon or in respect of the benefits acquired under a succession comprising in part extra-territorial movables abrogated by the provisions of The British North America Act, which limits the provincial power of taxation to 'taxation within the province'?

"The question at issue cannot, I think, be fully appreciated without taking into account the authority of the province to legislate upon the subject of 'Property and civil rights in the Province.' It is, of course, settled that the Dominion in the exercise of its authority relating to the subjects of legislation mentioned in section 91 may while acting within its own proper sphere legitimately pass laws which in their operation affect property and civil rights within the provinces; but it is equally well settled that over property and civil rights regarded as subjects of legislation in themselves the Dominion (except where acting under the specific provisions of that section) possesses no legislative authority. *Citizens v. Parsons*, 7 A.C. 96, at pp. 110 and 111. The subject of successions, the *decujus* being domiciled in Quebec, is one of those subjects which is within the exclusive authority of the Legislature of Quebec—in respect of which the authority of that Legislature is in Lord Watson's phrase 'as supreme' as before the passing of the Act.

"The right of a beneficiary entitled to share under such a succession is regulated by that Legislature alone. In the Courts of any country, which accept the law of the domicile as prescribing the rules of succession, the right of a person claiming to share in the benefit of such a succession would fall to be determined by the application of such rules that Legislature prescribes as applicable to such a case. In accordance with the principles already indicated the 'logical consequence' of this control of such successions by the Province of Quebec 'kept intact by the application of the fiction *mobilia ossibus inhaerent*' seems to involve this—every such succession may be deemed for the purpose among others of determining the incidence of duties imposed upon benefits accruing from the devolution of it to have as an entirety its seat in Quebec. On what ground, then, are we to restrict the words 'taxation within the province, so as to exclude such successions from the taxing authority of that province? There appears to be no ground for doing so. The possibility of those words being so restricted does not appear to have occurred to the Judicial Committee when considering the case of *Lovitt v. The King* (1912), A.C. 212.

"I have not been able to discover anything in *Woodruff v. The Attorney-General for Ontario* (1908), A.C. 508, which affects the force of these considerations. There was in that case no question of a testamentary or intestate succession. The Province of Ontario had attempted to exact duties in respect of transfers made *inter vivos*, though in contemplation of death, of movables having at the time the transfers were made a situs in the State of New York according to both the law of Ontario and the law of New York. The transfers were, as their Lordships held, effected by delivery in New York. It is argued, however, that a passage in the judgment of Lord Collins lays down two propositions, first, that taxation by a province, of property locally situated outside the province is *ultra vires*, and secondly, succession duties levied, by a province, upon benefits accruing from a succession devolving under the law of the province and composed in part of movables locally situate



outside the province are taxes imposed on extra-provincial property within this rule. It is needless to say that if such were the sense of a passage which forms the ground, or one of the grounds, of the judgment, it is not for this Court to refuse to follow it or to seek to fritter it away by insubstantial distinctions.

"I think this is a misreading of their Lordships' judgment. It is not without some bearing on the point of the meaning of the judgment that the appeal then before their Lordships did not involve the consideration of the validity of taxes imposed upon a succession such as we have here and that their Lordships' judgment does not in terms mention such a succession.

"Indeed, it seems to me that the second of the above mentioned propositions can be deduced from the judgment only through an assumption that it follows as a logical consequence from the first. A moment's consideration will show that this is not the case. Such benefits are generally recognized as being subject to the taxing power of the province as we have seen upon the principle that the totality of objects constituting a succession is subject to the personal law of the *decurjus* and consequently that the rights of persons claiming such benefits are governed by this personal law and are regarded as having their seat in the territory subject to it. There is, however, no principle generally recognized under which transactions *inter vivos* respecting particular movable objects are held to be governed by the *lex domicilii*. The more generally accepted view appears to be that according to the principle indicated by the maxim *mobilia sequuntur personam* the *lex domicilii* does not become applicable to such transactions as those which were in question in *Woodruff v. Attorney-General for Ontario* (1908), A.C. 508, but that, broadly speaking, it is only in respect of those transactions which (to use Mr. Westlake's phrase) a person's property is conceived and dealt with, (e.g. marriage contract) 'as an entirety grouped round the owner's person as a centre' that the *lex situs* has resort to the law of the domicile for

its legal rules; and this on the ground that in such cases, as in the case of movable successions, convenience imperatively requires that they be governed by a single law. Westlake, pages 181-186, 191-195; Savigny (Guthrie's translation) 176, note (2); Wharton, Vol. II, 680-684; Bar, 488-491; Foelix, paragraph 62; 1 Aubry et Rau, page 103; 1 Demolombe, pages 110 and 111. According to the law of Ontario (which follows the law of England) there seems to be no room for controversy that the transactions in question in that case were governed by the law of New York. The authorities are fully reviewed by Mr. Westlake (pp. 191-195), and his argument appears to leave no doubt upon the point. The donees consequently derived nothing through the law of Ontario.

"It is perhaps not to be expected that statutes such as that before us—which impose duties in respect of transmissions of the estates of domiciled residents including property situate abroad, and at the same time upon all property within the jurisdiction transmitted by death, wherever the domicile of the decedent may be—could escape criticism as putting into operation two seemingly incompatible principles. Strictly we are concerned in this case only with the question of the power of the Legislature in respect of the first mentioned class of duties; and constitutionally the Legislature's action in imposing such duties so far as it is constitutional, cannot be affected by the circumstance that it has also professed to exact them (if it have done so), in circumstances to which its authority does not apply. The truth is, however, that the practice very widely prevails of taxing all personal property having a situs within the territorial jurisdiction of the taxing power on the occasion of a transmission of title by or in consequence of death. The law of England, for example, maintains 'the paramount authority of the situs over the assets themselves as distinguished from the beneficial in the clear surplus'. Westlake, p. 125; and the estate duty applies to all such items having an actual local situs in the United Kingdom.

"'No one doubts', says Mr. Justice Holmes, delivering the judgment of the Supreme Court of the United States, in *Blackstone v. Miller*, 188 U.S.R. 189, at p. 204, 'that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicile, or that by the law of the domicile the chattel is part of a *universitas* and is taken into account again in the succession tax there. No doubt this power on the part of two States, to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law.'

"There is certainly nothing in the British North America Act pointing to the conclusion that a Canadian province is confined to either one or the other of these principles of taxation. One province may adopt that which gives special prominence to the circumstance that the succession is regulated by the law of the domicile, another to the fact that the title to particular items of movable property is controlled by the law of the situs. Toll may be exacted as an incident of the accrual of the benefit or as a condition of the passing of the title. And since either may be validly acted upon to the exclusion of the other, I do not see upon what ground it can be said that both principles may not be brought, so to speak, under the same roof, and combined in a single system. The decision of the Judicial Committee in *Lovitt v. The King* (1911), 28 Times L.R. 41; 105 L.T. 650; appears to support this view."

Although the decision of the Supreme Court of Canada in the *Cotton* case was subsequently reversed by the Privy Council, the grounds of that decision were entirely different from those considered by Duff, J., (now Chief Justice of the Supreme Court of Canada). It is accordingly be-

lieved that the validity of his reasoning has not been affected in any manner by the judgment of the Privy Council in that case. It remains to be considered as to whether or not it has been affected by the later judgment of the Judicial Committee in the *Kerr* case, *supra*.

Section 7 of the Alberta Act, under which the duties were imposed in the *Kerr* case, clearly placed the tax upon "all property of the owner thereof situate within the Province and . . . all the personal property . . . situate outside the province, and passing on his death" of an owner domiciled in the province. In referring to the property itself rather than to the succession, the Alberta Legislature was attempting to tax property by reference exclusively to its physical or actual situation. This being so, it is not difficult to understand the decision of the Judicial Committee that the tax was invalid in so far as it related to property physically or actually situated outside of the province.

In view of the incidence of the tax upon property, rather than in respect of the enjoyment of or succession to property, the Alberta Succession Duty Act, 1932, cannot be regarded as an Act imposing a true succession duty, the characteristics of which are set forth in the judgments delivered in *Winans v. Attorney-General*, *supra*. The tax being imposed upon property, as such, it comes within the category of estate or probate duties rather than that of succession duties. It has been asserted, however, that the judgment delivered by Lord Thankerton shows that the Judicial Committee is of opinion that Provincial Legislatures cannot impose succession duties in so far as such duties affect the outside personal property of a domiciled decedent. In support of this view reference is made to the following observations of His Lordship, namely:—

(a) "In their Lordships' opinion the principle to be derived from the decisions of the Board is that the province, on the death of a person domiciled within the province, is not entitled to impose taxation in respect of personal property locally situate outside the province, but that it is entitled to impose taxation on persons domiciled

or resident within the province in respect of the transmission to them under the provincial law of personal property locally situate outside the province."

(b) "The province next contended that, although locally situate outside the province, the personal property of a person, who dies domiciled within the province, is to be treated as 'within the province' for the purposes of section 92 of the British North America Act, by reason of the application of the rule embodied in the maxim *mobilia sequuntur personam*. This argument appears to proceed on a misunderstanding of the meaning and effect of that rule. If A. dies domiciled in the United States of America, leaving movable property locally situate in England, the latter country has complete jurisdiction over the property, but the law of England, in order to decide on whom the property devolves on the death of A. will not apply the English law of succession, but will ascertain and apply the American law. In other words, it is the law of England—not the law of America—that applies the principle of *mobilia sequuntur personam*, the locus of the latter remaining unchanged; in no sense could the property be described as 'within America.' "

With regard to the first extract from the judgment above quoted, it has been contended that Lord Thankerton intended thereby to lay down the precise limits of the powers of taxation possessed by Provincial Legislatures for death duty purposes, including legacy and succession duties. It has also been asserted that, in referring to "transmission", His Lordship intended to include "a succession", as that expression is defined in the English Succession Duty Act, 1853, and that the expressions "transmission" and "succession" are synonymous.

These contentions can scarcely be supported when it is remembered that His Lordship was dealing with a statute which imposed taxation directly upon property, and that he was not concerned with the abstract question as to whether or not a Provincial Legislature could impose taxation upon or with respect to a succession, regarded as a right

or privilege. The Judicial Committee has frequently expressed the view that it is unwise to deal with academic or abstract questions, not necessary for the decision of the matter in hand. See, for example, the judgment of Viscount Haldane, in *John Deere Plow Company, Ltd. v. Whar-ton* (1915), A.C. 330, at p. 339. Accordingly it is reasonable to conclude that the observations of Lord Thankerton must have been intended to have reference exclusively to the Alberta statute under consideration, and to the decisions of the Courts so far as they affected the interpretation of that statute, or to statutes affecting the taxation of property passing on death. If this were not so, he would scarcely have added the statement that "the cases on legacy and succession duties are of little assistance for the present purpose." The suggestion that the expressions "transmission" and "succession" are synonymous terms does not find support in the judgment of Hodgins, J.A., in *Attorney-General of Ontario v. Baby* (1927), 1 D.L.R. 1105; 60 O.L.R. 1.

With regard to the observations of His Lordship on the application of the maxim '*mobilia sequuntur personam*', it is again essential to bear in mind that His Lordship was dealing with a provincial statute which imposed taxation upon property by reference to its physical or actual situation. The purpose of his observations was quite obviously to emphasize the fact that the physical or actual situation of property could not be disturbed by the application of a Latin maxim. In the illustration which he uses he says "in no sense could the property be described as 'within America'." It is noteworthy that he does not say that "in no sense could the right or title to property of a decedent domiciled in his lifetime in the United States be described as 'within America'." Notwithstanding the observations of His Lordship, it may be contended that the maxim '*mobilia sequuntur personam*' is still applicable to the construction of provincial legacy and succession duty enactments, for the reason that as the right of passing laws relating to the distribution of the personal property of de-

ceased persons is vested in the province of the domicile exclusively, this exclusive legislative jurisdiction should logically confer upon that province the exclusive power of taxation in respect of the exercise of that right and the benefits thereby conferred. This view receives support in the following observations of Lord Robson, in the judgment delivered by him in *Rex v. Lovitt* (1912), 1 App. Cas. 15, at pp. 93 *et seq.*:—

“The defendant, however, contended that the situation of the property is to be determined, not by its actual locality, but according to the principle expressed in the maxim ‘*mobilia sequuntur personam*’. Personal property of a movable nature is considered, they say, to follow the person of the owner, and is, in contemplation of law, situate wherever he is domiciled. In this view the property was neither in London nor New Brunswick but in Nova Scotia.

“It is necessary, therefore, to examine somewhat closely the sense in which movables are said to ‘follow the owner’. It cannot mean that for all purposes the actual situation of the property of a deceased owner is to be ignored and regard had only to the testator’s domicile, for executors find themselves obliged in order to get the property at all to take out ancillary probate according to the locality where such property is properly recoverable, and no legal fiction as to its ‘following the owner’ so as to be theoretically situate elsewhere will avail them. The case of legacy and succession duties, however, has been placed by our law on a different footing.

“In construing the statutes relating to those duties, our Courts have laid it down that the very general terms in which they are expressed must receive some limitation. Their language is wide enough to include all property and every person everywhere, whether subjects of this kingdom or not, and no matter where they are domiciled. It has accordingly been held, through a long series of cases, that the duties are intended to be imposed only on those who

become entitled by virtue of our law. The effect of this principle is to exempt from the payment of legacy or succession duties movable property situate here which belonged to a testator domiciled abroad, for in dealing with the distribution of such property our Courts act not on our own law, but on the law of the domicile of the testator or intestate on which the legatee or successor founds his title. Similarly in the case of movables situate abroad which belonged to a person domiciled here our Courts will direct their distribution according to our law and not that of the locality where they are found. In *Blackwood v. Reg.* (8 App. Cas. 82, at p. 93), Sir Arthur Hobhouse, in delivering the judgment of their Lordships' Board, says: 'For the purpose of succession and enjoyment, the law of the domicile governs the foreign personal assets. For the purpose of legal representation of collection and of administration as distinguished from distribution among the successors they are governed not by the law of the owner's domicile but by the law of their own locality.'

"When, therefore, it is said that '*mobilia sequuntur personam*' all that is meant is that for certain limited purposes we deal with '*mobilia*' (or leave them to be dealt with) under the law governing their owner as though they were situate in his country instead of ours, and, in return, foreign countries generally do the like with regard to English movables situate abroad.

"The principle or practice thus defined is considered just and expedient as between nations, and our Courts give it full effect in the construction of taxing statutes both English and Colonial."

Having regard to the foregoing observations and citations it is considered that the views of Duff, C.J.C., as expressed by him in the *Cotton* case, with reference to the powers of Provincial Legislatures of imposing legacy and succession duties have in no sense been prejudiced or affected by the decision of the Judicial Committee in the



*Kerr* case. These views were reiterated in the judgment delivered by him in *Alleyn-Sharples v. Barthe* (1920), 1 W.W.R., at pp. 965 *et seq.* Similar opinions have been expressed by certain of the other members of the Supreme Court of Canada in the case of *Smith v. Provincial Treasurer of Nova Scotia* (1919), 58 S.C.R. 570; 47 D.L.R. 108. It is thought, however, that the judgments in that case erred in holding that the Nova Scotia Succession Duty Act, 1912, imposed taxation upon or in respect of the succession. Section 6 of that Act clearly imposes the tax upon property by reference to its physical or actual situation, and thus brings the measure within the same category as the Alberta legislation which was held to be *ultra vires* in the *Kerr* case.

By way of further illustrating the distinction between a tax upon property and a tax upon or in respect of the succession, reference may be made to the decision of the New Brunswick Supreme Court in *Provincial Secretary-Treasurer of New Brunswick v. Robinson* (1923), 2 D.L.R. 674; 50 N.B.R. 367. This was a case stated for the opinion of the Court as to the succession duty payable in the estate of one Jeanette A. Jordan to the Province of New Brunswick. The deceased died at San Francisco on October 17, 1920. At the time of her death she was domiciled in the State of California. On September 21, 1920, she made her will whereby she appointed the defendant Robinson executor thereof, as to so much of her estate as might be in Canada. At the time of her death Mrs. Jordan was possessed of property situated in California and elsewhere outside of New Brunswick of the value of \$883,283.62, and her property in the Province of New Brunswick at the same time consisted of personal property of the value of \$16,548.84, making the aggregate value of the estate \$899,832.46. There were twenty legatees under the will, entitled to receive under its terms certain sums varying from \$1,000.00 to \$5,000.00 who at the time of Mrs. Jordan's death were domiciled in New Brunswick, the total amount of such legacies being \$84,000.00. The Province

of New Brunswick claimed duty on the total legacies, basing its claim on subsection 1(c) of section 8 of the Succession Duty Act, 1915, as follows:—

(1) So far as the legislative authority of the Province extends to do so, the following property shall be deemed to be within the province: (c) all property situate outside the province belonging to a person not domiciled therein, if and to the extent that such property shall pass by demise, or intestacy, or by transfer to a person domiciled therein.

It was held that as the tax imposed was upon property, as distinct from a tax upon the transmission or devolution of property, succession duty was not payable to the full amount of the legacies given to the persons domiciled in New Brunswick, but only the assets situate in New Brunswick valued at \$16,548.84, which passed through the hands of the New Brunswick executor, were liable to such duty.

## CHAPTER III.

### THE TAX IN ONTARIO.

The tax imposed by the Ontario Succession Duty Act, 1934, as subsequently amended, has certain characteristics in common with that imposed in other provinces, as follows:—

(1) It is neither a debt nor a testamentary expense; and

(2) It accrues and is payable at death and is determined by the facts then existing.

#### Not a Debt nor a Testamentary Expense.

Testamentary expenses do not include succession duties. It has been held that such duties are neither debts of the deceased nor testamentary expenses.

*In re Bolster* (1905), C.L.T. 455; 10 O.L.R. 591; 6 O.W.R. 300. This was an appeal to the Divisional Court by Sarah Bolster, a legatee under the will of Lancelot Bolster, deceased, from an order of Teetzel, J. The contention raised by the appellant, who was one of the specific legatees, was, that under the direction in the will that the executors were to pay the debts and funeral and testamentary expenses they were bound to pay the succession duties out of the residue, to the exoneration of the specific legatees. It was held by Street, J., that succession duties do not come within the description either of a debt or part of the testamentary expenses; and that the specific legacies, not being specially exonerated by the will, were not to be exonerated from their proportion of the succession duties payable upon the whole of the estate, at the expense of the residuary legatees.

*In re Munro*, 12 O.W.N. 871. The executors and trustees under the will of William Munro, deceased, moved for an

order declaring whether the succession duties payable by the estate of the deceased should be charged against and paid out of the specific legacies given by the will of the deceased, or charged against and paid out of the residuary estate. Britton, J., held that succession duty was not a testamentary expense, and that the statute contemplated the payment of the duty out of the particular property disposed of, as passing to particular persons.

*In re Elizabeth Watkins, deceased* (1906), 12 B.C.R. 97. The testator made a will in 1896 leaving certain lands to devisees therein named. Between the date of the will and her death, in 1900, municipal and provincial taxes had accumulated on the devised lands. The parties taking the lands under the will claimed the right to have the taxes paid out of moneys which had been realized by the executors from the other parts of the estate, on the ground that the residuary fund was, by the will, expressly made liable as a fund for the payment of her funeral, testamentary expenses, and debts. On this state of facts, certain questions were submitted, including the following:

Do the succession duties payable under the Succession Duty Act in respect of the real estate of the said deceased form part of the testamentary expenses of the deceased and become payable out of the residuary estate, or are they to be chargeable against the different properties devised under the will?

It was held that the succession duty payable under the Act (R.S.B.C. 1897, ch. 175) in respect of the real estate of the deceased was not a testamentary expense but was chargeable against the different properties devised under the will.

See also *Kennedy v. Protestant Orphans' Home* (1894), 25 O.R. 235; *Manning v. Robinson* (1898), 29 O.R. 483; *Re Holland* (1902), 22 C.L.T. 164; 3 O.L.R. 406; 1 O.W.R. 73; *In re Galbraith Estate* (1919), 2 W.W.R. 980; 48 D.L.R. 42.

### **Tax Accrues at Death.**

An important principle underlying succession duty legislation in the provinces is that the tax accrues at the death of the owner of the property, and that all matters in relation to the taxation are determined by the facts then existing. The application of this principle involves the following results, namely:—

(1) Valuations of property for succession duty purposes are the values existing at the death of the owner; and

(2) The rates of taxation applicable to the property of a deceased person or in respect of the succession to such property are the rates in force at the time of death, in the absence of clear statutory provision to the contrary.

### **Valuations.**

The value of the property 'passing on the death' of the owner is one of the two chief factors governing the rates and amount of succession duty applicable, the other being the relationship, if any, of the beneficiaries to the decedent. The value for purposes of duty is the value at death, and accordingly depreciation after death is not a good ground for claiming a revision or reduction of the duty.

The practical application of this principle has occasionally worked hardship. It has been suggested that in cases where such hardship is proved to exist the several provincial governments might consider the wisdom of remitting the whole or part of the taxation imposed. Thus, in *Rez v. The United States Fidelity Company* (1921), 2 W.W.R. 697; 60 D.L.R. 372; Gregory, J., of the Supreme Court of British Columbia, in giving judgment in favour of the Crown, suggests that the amount of the duty in that case and in similar cases might very well be reduced by the Crown as an act of grace and bounty. Referring to the serious depreciation in the value of the property taxed in that case, he says: "The property to-day is practically valueless—it has, as a matter of fact, largely been sold for taxes . . . There had been a most unprecedented boom

in real estate shortly prior to the death of Mrs. Quagliotti, during which absolutely unheard of values were put upon real estate in every part of the City of Victoria."

The principle that valuations of property for death duty purposes must be determined by the facts existing at the death of the owner, is applied in other jurisdictions as well as in Canada.

It has been decided in England, for example, that a fall in the value of property subsequent to the valuation is not a good ground for obtaining a return of the duty paid.

In *Wishart and others (Gellatly's Executors) v. Lord Advocate* (1880), 8 S.S.C. 4th Series, 74; 18 S.L.R. 62; part of the assets of the deceased included certain City of Glasgow Bank Stock. The executors valued this stock on 6th March, 1878, at £5,738, its then selling price. The bank went into liquidation in October of the same year, but it was held that the executors could not say that the stock was of no value for duty purposes for the reason that the executors might have sold in March for £5,738.

In the United States of America the same principle is applied for inheritance tax purposes. The rule is well established there that any increase or decrease in the value of property between the time of death and the time of distribution, is disregarded in imposing the tax.

*Matter of Penfold* (1915), 216 N.Y. 163; 110 N.E. 497. In this case the tax was imposed on the value of certain stocks at death, and no deduction was allowed notwithstanding that the executor was forced to sell the stocks at a loss during administration.

*Matter of Meyer*, 209 N.W. 386; 103 N.E. 713. An equity of redemption was valued at \$8,000.00 for inheritance tax purposes. This equity was subsequently lost through mortgage foreclosure proceedings, but it was held that this loss did not affect the amount of the inheritance tax payable.

*In re Canfield's Estate* (1916), 96 Misc. 119; 159 N.Y. Supp. 735; it was held that the fact that certain antiques

sold at a higher price than that at which they were appraised could not give rise to an increased claim for duty. In this case, the value of the property was low at the time of death in December, 1914, owing to the unsettled financial conditions then prevailing on account of the World War.

The principle receives further illustration in the following cases, namely: *Hanberg v. Morgan*, 263 Ill. 616; 105 N.E. Rep. 720; *Re Carnegie*, 191 N.Y. Supp. 753; *Re DeLamar*, 192 N.Y. Supp. 412; *Hooper v. Bradford* (1901), 178 Mass. 95; 59 N.E. 678; *Re Hite* (1911), 159 Cal. 392; *Cochran's Exec. v. Commonwealth* (1931), 241 Ky. 656; 44 S.W. (2d) 603.

#### Rates of Taxation.

The statutory provision that succession duty accrues at death involves as a logical consequence the doctrine that the determination of the rates of taxation applicable must be according to the law in force at that time.

*In re Lee*, 18 Ont. L.R. 550. This was an appeal by the executors of Arthur Brindley Lee from an order made by Winchester, Judge of the Surrogate Court of the County of York, Ontario. The deceased died on June 24th, 1904, and the gross value of his estate was over \$200,000.00, but the net value, after deducting debts, was under \$100,000.00. It was held that the estate was liable to succession duty at the rate of five per cent. on the net value under R.S.O. 1897, ch. 24, as amended by 1 Edw. VII, ch. 8, sec. 3, and that the later statute, 5 Edw. VII, ch. 6, under which the duty would be only 2 per cent., could not be given a retrospective operation, while the statute, 7 Edw. VII, ch. 10, notwithstanding section 2 thereof, did not apply to the case or affect the matter. Per Garrow, J.A.: "The duty is a debt owing to the Crown as of the date of the death of the testator . . . The debt as of the date of death, it will be admitted, ought not to be subsequently increased by mere construction, and an argument against its increase by construction ought to be equally potent to prevent its decrease, except upon explicit language."

### Constitutionality of Tax.

The determination of the exact nature and incidence of the duties imposed by the Ontario Act, and how far they are constitutionally valid, involve a discussion of the following questions, namely:—

- (1) Is the taxation direct?
- (2) Does the Act impose taxation within the province?
- (3) Does the taxation reach a definite subject or object so as to satisfy the principle of strict construction?

### Direct Taxation.

By section 6 of the Act it is provided that at the date of the death of any person,—

- (a) all property situate in Ontario passing on the death of such person, whether such person was at the time of his death domiciled in Ontario or elsewhere;
  - (b) every transmission within Ontario owing to the death of any person domiciled therein of personal property locally situate outside Ontario;
  - (c) every disposition of any property (other than realty situate outside Ontario) made within Ontario by any such person during his lifetime, on or after the 1st day of July, 1892;
  - (d) every person to whom a disposition of any personal property (other than the property mentioned in clause g of section 6a of the Act) was made after the date of the coming into force of the Act by the deceased in his lifetime outside Ontario, in respect of such personal property, when such deceased person was domiciled within Ontario at the time of such disposition and at the time of his death, and when the person to whom such disposition was made was resident or domiciled within Ontario at the time of such disposition and at the time of the death of the deceased person;
- shall be subject to duty at the rates mentioned in the Act.



Section 10 provides that every heir, legatee, devisee or donee, and every person to whom property passes for any beneficial interest in possession or in expectancy or in whose favour a disposition is made shall be liable for the duty upon so much of the property as so passes to him and which is dutiable in Ontario according to the provisions of the Act, and shall also be liable for the duty, if any, in respect of any transmission or disposition to him.

By section 17 it is provided that no executor or trustee, as such, shall become personally liable for any duty whatsoever provided for by the Act, but an executor, trustee or other person in whom any interest in the property passing on the death, or the management thereof, is at any time vested, shall not transfer such property to the person beneficially entitled thereto without deducting therefrom the duty (if any) for which such person is liable. If an executor, trustee, or other person transfers property subject to duty without deducting the duty therefrom, he is required to pay to the Provincial Treasurer, as a penalty, the amount of such duty and interest thereon together with an additional fifty per centum of the amount of such duty.

Although an executor or administrator must file the prescribed succession duty affidavit and inventories before the issue of letters probate or letters of administration, there is no provision in the Act requiring security to be furnished before letters are issued. The only provision regarding security is that contained in subsection (5) of section 10 which enables the Provincial Treasurer to accept a sufficient sum as security for the due payment of the duty.

These features of the Ontario legislation indicate clearly that the duties imposed thereby constitute direct taxation. There is no attempt whatever to make the executor or administrator of a deceased person personally liable in any manner except in circumstances where property subject to duty is transferred to a beneficiary without the duty having been deducted therefrom. It cannot be said, therefore, that such executor or administrator is called upon to pay the

duties in the expectation and intention that he shall recoup himself by making a demand upon the beneficiaries.

### **Taxation Within the Province.**

The Ontario Act makes provision for the taxation of certain properties, transmissions and dispositions of property, and for a tax upon persons in respect of property, as follows:—

(1) Property situate in the province owned by a deceased person at the time of his death and passing on his death to or for the benefit of the classes of beneficiaries specifically mentioned.

(2) Property situate in the province deemed to pass on the death of a person to or for the benefit of the classes of beneficiaries specifically mentioned.

(3) Transmission of the outside personal property of a domiciled decedent to or for the benefit of a person or persons resident in the province.

(4) The so-called transmission of the outside personal property which passes or is deemed to pass on the death of a domiciled decedent to or for the benefit of a person or persons resident in the province.

(5) Disposition of any property (other than realty situate outside Ontario) made within Ontario by any deceased person during his lifetime, on or after the first day of July, 1892.

(6) Property in respect of which a disposition was made by the deceased person outside Ontario during his lifetime, where such deceased person was domiciled in Ontario at the time of the disposition and at the date of his death and which property was situate within Ontario and owned by the person to whom such disposition was made at the date of the death of such deceased person, or any other property into which such property has become directly converted, or which, exclusive of income, has been derived therefrom, when such other property was situate

within Ontario and owned by the person to whom such disposition was made, at the date of the death of the deceased person.

(7) Every person to whom a disposition of any personal property (other than property mentioned in item number (6) above) was made after the date of the coming into force of the Act by the deceased in his lifetime outside Ontario, in respect of such personal property, when such deceased person was domiciled within Ontario at the time of such disposition and at the time of his death, and when the person to whom such disposition was made was resident or domiciled within Ontario at the time of such disposition and at the time of the death of the deceased person.

#### Property Taxation.

In nearly all the cases before the Privy Council a property tax, charged upon and payable out of the property, has been regarded as a customary and proper method of taxation, provided the property is situate within the province. See, for example, *Rex v. Loritt* (1912), A.C. 212; 81 L.J.P.C. 140; reversing 43 S.C.R. 106. This being so, the tax imposed by the Ontario Act upon property situate in the province, and passing or deemed to pass on the death of a deceased person, must, generally speaking, be regarded as coming within the category of taxation within the province. The taxation of transmissions within the province of the outside personal property of domiciled decedents has also been upheld by the Judicial Committee. *Allyn-Sharp v. Barthe*, *supra*.

Notwithstanding that the validity of a tax upon property situate in the province cannot, as a rule, be challenged, there may perhaps be some doubt as to the constitutional validity of the particular variety of property taxation mentioned in clause g of section 6a of the Ontario Act. This clause imposes a tax upon property situate in Ontario at the time of the death of a deceased person, in respect of

which property a disposition was made by the deceased person outside Ontario during his lifetime, where

- (a) Such deceased person was domiciled in Ontario at the time of the disposition and at the date of his death; and
- (b) The property was owned by the person to whom the disposition was made at the date of the death of such deceased person.

It may possibly be contended, with some degree of force, that the tax thus imposed is not a tax upon property in the province strictly so called, but constitutes rather taxation of a composite character which is imposed partly upon the disposition of the property taking place outside Ontario and partly upon the property itself with reference to its situation in Ontario at the time of the death. It may further be argued that the tax is upon something which is not within the province considered in the following alternative aspects, namely:—

- (a) That the real object of the taxation is not the property itself, but rather the disposition of the property which takes place outside the province during the lifetime of the deceased; or
- (b) That if the tax can be regarded as taxation upon property, the imposition is nevertheless made dependent upon a transaction or acting with respect to such property which takes place outside of the province.

With the sole exception of that feature of the taxation which requires that the property shall be found in Ontario at the time of the death, the other characteristics of the duty imposed by clause g of section 6a of the Ontario Act are very similar to the tax imposed by the Ontario Succession Duty Act, 1897, ch. 24, which was held to be *ultra vires* by the Privy Council in *Attorney-General for Ontario v. Woodruff* (1908), A.C. 508. In *Madden v. Nelson and Fort Sheppard Ry. Co.* (1899), A.C. 626, at pp. 627, 628,

it was said "it is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly."

### **Taxation of So-called Transmissions.**

Section 6e of the Ontario Act contains a provision the constitutional validity of which may be open to question. This section provides as follows:—

**6e.** When a person dies domiciled within Ontario and any property mentioned in sections 6 and 6a, being personalty and being situate outside Ontario at the time of death, passes on the death to a person resident or domiciled within Ontario at the time of the death, there shall be deemed to be with respect to such property a transmission within Ontario owing to the death of a person domiciled therein, of personal property, locally situate outside Ontario, within the meaning of this Act.

If the transmission of any property passing or deemed to pass on the death cannot be determined as being within the province, upon applying the principles of the common law, then it is considered that the Provincial Legislature cannot make it a provincial transaction by the simple expedient of declaring that it shall be deemed to be so.

The section covers property which is owned by the deceased at the time of his death, and property deemed to pass on the death within the meaning of section 6a. Joint property, annuities, and life insurance policies are amongst the properties deemed to pass on the death. Even if these properties are created or come into existence as the result of transactions or actings of the deceased during his lifetime outside of the province, nevertheless the Ontario provision above quoted attempts to make them subject to taxation if the beneficiary or beneficiaries happen to be resident or domiciled within the province at the time of the death. While it is no doubt possible to impose taxation upon transactions which take place within the boundaries of the province and relating to property therein, it is considered that a Provincial Legislature cannot, by statute, prescribe the conditions fixing the situs of transactions as being

within the province where they are ordinarily regarded as taking place outside the provincial boundaries. Support for this view is found in the judgment of the Supreme Court of Canada in *The King v. National Trust Company* (1933), Can. S.C.R. 670; (1933), 4 D.L.R. 465; affg. (1933), 2 D.L.R. 474; 54 Que. K.B. 351. In that case the Province of Quebec claimed succession duties in respect of debentures of the Grand Trunk Pacific Railway and of the Canadian National Railway Company, respectively, guaranteed by the Government of the Dominion of Canada, and belonging to a decedent who was at the date of his death domiciled in Ontario where the debentures were in his possession. Notwithstanding the accepted rules as to situs of specialty and simple contract debts, the application of which indicated that the debentures were not situated in Quebec, the Province claimed that duty was nevertheless payable in respect of the transmission of the debentures. This claim was based on sections 3 and 5 of the Quebec Succession Duties Act, R.S.Q. 1925, ch. 29, which provided as follows:—

3. All property, moveable or immoveable, the ownership, usufruct, or enjoyment whereof is transmitted owing to death, shall be liable to the following taxes calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death . . . .

5. The word "property" within the meaning of this division includes all property, moveable or immoveable, actually situate within the province, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the province, or are due by a debtor domiciled therein; the whole whether the deceased at the time of his death had his domicile within or without the province or whether the transmission takes place within or without the province.

In holding that the debentures in question were not situated in Quebec, and that they were not liable to duty there, Duff, C.J.C., makes reference to the statutory provisions in these terms, namely:—

"The enactments of the statute purport to impose a tax upon property transmitted owing to death; and, there-

fore, they only affect subjects having a situs within the Province (*Woodruff v. Attorney-General for Ontario* (1908), A.C. 508; *The King v. Lovitt* (1912), A.C. 212; *Toronto General Trusts Corporation v. The King* (1919), 46 D.L.R. 318; *Brassard v. Smith* (1925), 1 D.L.R. 528; *Provincial Treasurer of Alberta v. Kerr* (1933), 4 D.L.R. 81).

"The question we have to consider is whether or not these bonds have, in the relevant sense, a local situation within the province.

"Some propositions pertinent to that issue may, we think, be collected from the judgments of the Judicial Committee of the Privy Council, if not laid down explicitly, at least, as implicit in them. First, property, whether movable or immovable, can, for the purposes of determining situs as among the different Provinces of Canada in relation to the incidence of a tax imposed by a provincial law upon property transmitted owing to death, have only one local situation. In applying this proposition, of course, it is necessary to distinguish between a tax upon property, and a tax upon persons domiciled or resident in the province (*Toronto General Trusts Corporation v. The King*; *Provincial Treasurer of Alberta v. Kerr*).

"Then, it seems to be a corollary of this proposition that situs, in respect of intangible property (which has no physical existence) must be determined by reference to some principle or coherent system of principles; and again, the Courts appear to have acted upon the assumption that the British Legislature, in defining, in part, at all events, by reference to the local situation of such property, the authority of the Province in relation to taxation, must be supposed to have had in view the principles of, or deducible from, those of the common law (*The King v. Lovitt*; *Toronto General Trusts Corporation v. The King*; *Brassard v. Smith*; *Royal Trust Company v. Attorney-General of Alberta* (1930), 1 D.L.R. 868).

"We think it follows that a Provincial Legislature is not competent to prescribe the conditions fixing the situs

of intangible property for the purpose of defining the subjects in respect of which its powers of taxation under the B.N.A. Act 1867, section 92(2), may be put into effect."

If a Provincial Legislature is not competent to prescribe the conditions fixing the situs of intangible property for purposes of taxation, it would appear to follow that such lack of competence extends to the fixing of the situs of transactions or actings of the deceased in his lifetime with reference to property.

It is important to observe that the properties deemed to pass on the death for the purposes of the Ontario Act are properties which are largely unconnected with a testate or intestate succession. Among these properties are the following:

- (1) Property held in the joint names of the deceased and one or more persons;
- (2) Property passing under a settlement;
- (3) Annuities or other similar interests purchased or provided by the deceased;
- (4) Policies of insurance effected by the deceased in favour of a specific donee;
- (5) An estate in dower or by the curtesy;
- (6) Property of which the deceased in his lifetime was competent to dispose;
- (7) Property disposed of by the deceased in his lifetime outside Ontario.

With the possible exception of properties passing under a settlement, and estates in dower or by the curtesy, it cannot be said that the domicile of the deceased has a bearing upon the above classes of property in the same manner as it has upon property, the subject-matter of a succession in the strict sense of that term. In these circumstances, it follows that if these properties are situate outside of the province, then a tax cannot be imposed upon them or upon any transfer or other disposition of them under the guise of what is termed a tax upon the transmission, for the reason



that provincial powers of taxation are limited to taxation within the province. In the judgment delivered by him in *The King v. Cotton, supra*, Duff, J., (now C.J.C.), refers to this subject, so far as it concerns property transferred *inter vivos*, in the following terms, namely:—

“There is, however, no principle generally recognized under which transactions *inter vivos* respecting particular movable objects are held to be governed by the *lex domicilii*. The more generally accepted view appears to be that according to the principle indicated by the maxim *mobilia sequuntur personam* the *lex domicilii* does not become applicable to such transactions as those which were in question in *Woodruff v. Attorney-General for Ontario*, 1908, A.C. 508, but that, broadly speaking, it is only in respect of those transactions which (to use Mr. Westlake’s phrase) a person’s property is conceived and dealt with (e.g. a marriage contract) ‘as an entirety grouped round the owner’s person as a centre’ that the *lex situs* has resort to the law of domicile for its legal rules; and this, on the ground, that in such cases, as in the case of movable successions, convenience imperatively requires that they be governed by a single law.”

### Dispositions of Property Within Ontario.

Among the subjects of taxation mentioned in section 6 of the Ontario Act are dispositions of property (other than realty situate outside Ontario) made within Ontario by any person during his lifetime, on or after the 1st day of July, 1892. Section 6b defines dispositions as including for all purposes of the Act,—

- (a) Any voluntary transfer, payment, gift, release, surrender, waiver, mailing, dispatching or sending, of any property or any benefit or interest in any property by the deceased person or by his agent or nominee,
  - (1) by way of declaration of trust, creation of trust, or otherwise, or
  - (2) through the instrumentality or agency of any company, partnership or business in

which either the deceased person or such other person was either alone or in combination with any member of his family, beneficially interested, directly or indirectly, to the extent of not less than fifty-one per centum, or

(3) by any other method whatsoever, whereby any property or benefit or interest in any property passes, directly or indirectly, from the deceased person during his lifetime to any other person;

- (b) The transfer of, or the agreement to transfer any property by the deceased, for partial consideration in money or money's worth for the deceased's own use and benefit to the extent to which the value of the property so transferred or agreed to be transferred exceeds the value of such consideration;
- (c) The transfer to or settlement on, or the agreement for such transfer to or settlement on, any person or persons by the deceased, in consideration of marriage;
- (d) The creation of, or the contribution to a joint tenancy of any property by the deceased when the deceased was one of the joint tenants and when one of the other joint tenants has subsequently and in the lifetime of the deceased, taken or converted such property to his own use and benefit by way of withdrawal, transfer, partition, severance or otherwise.

The wording of section 6 suggests that there may be a disposition within Ontario of personal property situate without the province, so as to subject that disposition to taxation. It becomes necessary, therefore, to consider what is the proper law governing dispositions *inter vivos* of personal property. Dispositions of tangible property, whether movable or immovable, are regarded as being governed by the *lex rei sitae*, and, as to such property, it would appear to

follow that the Ontario law taxing dispositions must be regarded as confined to dispositions of property situate within the province.

It is not altogether clear, however, that the *lex rei sitae* applies in all cases with respect to the transfer of intangible movables. It is doubtless true that the transfer or disposition of a mortgage of land is governed by the law of the *situs* of the land. The transfer of the mortgage debt is also governed by this law, as the debt cannot be effectually transferred apart from the transfer of the security. *In re Hovyes, Row v. Jagg* (1911), 1 Ch. 173. Similar considerations apply with respect to the transfer of a negotiable instrument, and the debt which it represents or evidences. There are certain instruments, however, the transfer or disposition of which must be registered, and in these cases the transfer of the debt and the transfer of the instrument are not necessarily governed by the same law. It is considered that the transfer of the debt in such cases is governed by the law of the place of registration, while the transfer of the instrument is governed by the *lex rei sitae* at the time of the transfer.

Having regard to the various judgments delivered in *Republica de Guatemala v. Nunez* (1927), 1 K.B. 699, the question as to what law is applicable to the transfer or disposition of simple contract debts in general cannot be regarded as satisfactorily settled. It has been suggested that the *lex rei sitae* of the debt should govern the transfer. On the other hand, certain of the judiciary have expressed opinions in favour of regarding transfers of debts as being analogous to contracts and so governed by the law applicable to contracts. *Lee v. Abdy* (1886), 17 Q.B.D. 309; *Republica de Guatemala v. Nunez* (1926), 95 L.J.K.B. 955; 42 T.L.R. 625, Greer, J.

In the result, it may be said that, for taxation purposes dispositions of personal property cannot generally be regarded as having taken place within the province where the property is located elsewhere. In the case of intangible property, however, there may be isolated instances where the

disposition may be looked upon as having a *situs* of its own, apart from the location of the property, the subject-matter of the disposition. Assuming that it is possible to tax a disposition of this kind, it is difficult to understand how such taxation could be enforced in circumstances where the property remains permanently out of the province and where the beneficiary is and never has been resident therein and owns no other properties exigible to execution. The general rule is that the revenue laws of one country are not taken notice of in another country, and it is on this principle that judgments proceeding upon such laws are not recognizable. *Attorney-General for Canada v. Schulze* (1901), 9 Sc. L.T. 4; *Planche v. Fletcher*, 1 Douglas 251. It is also on this principle that it has been held in the United States that the Courts of one State cannot be used as a means of collecting the taxes imposed by another. *Henry v. Sargeant*, 13 N.H. 321, at p. 332, per Parker, C.J. In *Municipal Council of Sydney v. Bull* (1909), 1 K.B. 7, Mr. Justice Grantham dismissed an action brought by the Municipal Council of Sydney to enforce the payment of a local improvement rate on the authority of an Act of the Legislature of New South Wales, whereby the Council was authorized to recover the amounts levied under the Act, by action. It was held that the action was analogous to an action brought in one country to enforce the revenue laws of another country and consequently would not lie. See also *In re Visser; Queen of Holland v. Drukker* (1928), Ch. 877, 882; *State of Colorado v. Harbeck*, 232 N.Y. 71; *State of Maryland v. Turner*, 75 Misc. Rep. 9.

### **Taxation of Residents in Respect of Property.**

By Clause (d) of section 6 of the Ontario Act provision is made for the taxation of every person to whom a disposition of personal property was made by the deceased in his lifetime outside Ontario, in respect of such property, where

- (a) Such deceased person was domiciled within Ontario at the time of the disposition and at the time of the death; and

- (b) The person to whom such disposition was made was resident or domiciled within Ontario at the time of the disposition and at the time of the death.

As applied to outside personal property, this provision is believed to be of doubtful validity, even although the tax is aimed at persons resident in the province. It is noteworthy that the tax is upon a resident person "in respect of personal property", where a disposition of such property has been made outside of the province in the lifetime of the deceased. If the property is outside of the province, and, therefore, beyond the jurisdiction of the Provincial Legislature, it may be argued that the tax is *ultra vires* as being, in effect, a tax upon property situate outside of the province. In support of this view, reference may be made to the following observations of Duff, J., (now C.J.C.), in *Smith v. Rural Municipality of Vermilion Hills*, 20 D.L.R. 114, at p. 119:—

"The point the appellant really endeavours to make in this connection is that the legislation infringes the prohibition of section 125 of The B.N.A. Act 'no lands or property belonging to Canada or any province shall be liable to taxation.' Now, first, it is beyond question that the appellant is assessed in respect of the occupation of the lands in question, which lands, as I have already said, are (subject to the interest vested in him by virtue of his leases) the property of the Crown in the right of Canada. If this legislation really and truly authorizes the taxation of the appellant in respect of the property of the Crown then I have no hesitation in saying that it does infringe this provision."

Taxation of Crown property and taxation of property situate outside of the province are equally beyond the jurisdiction of the Provincial Legislature. By analogy to the language above noted, it may accordingly be said that, as the Ontario tax in question is upon a resident of the province in respect of outside personal property, it is *ultra vires* of the Provincial Legislature. It may also be urged that a tax upon a person in the province in respect of property

situate outside the boundaries of the province is invalid for the reason that the Legislature cannot do indirectly that which it cannot do directly.

As against the view thus expressed it may be contended that it is quite proper to tax persons within the province on the basis of their foreign possessions, and that authority for this proposition is found in the judgment of the Judicial Committee in *Bank of Toronto v. Lambe* (1887), 12 A.C. 575; 56 L.J.P.C. 87. In that case, however, the statute under consideration did not tax banks in respect of the outside property owned by them, but merely referred to the paid-up capital of these institutions as the standard or measuring rod by which to ascertain the amount of the personal or residence tax thereby imposed. The same measuring principle has been applied in determining the rate or rates of taxation chargeable under provincial Succession Duty Acts. *Minister of Finance of British Columbia v. Royal Trust Co.*, (1920), 61 Can. S.C.R. 127; 56 D.L.R. 226; reversed, on the construction of the Act, *sub nom. Royal Trust Co. v. Minister of Finance of British Columbia* (1922), 1 A.C. 87; 61 D.L.R. 194.

#### Strict Construction.

In *Partington v. Attorney-General*, *supra*, Lord Cairns said: "As I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

Apart altogether from any question of the constitutionality of the Ontario Act, it is necessary to examine its provisions somewhat carefully to ascertain how they are affected by the application of the principle of strict construction.

The sections of the Act which relate particularly to the incidence of the taxation are as follows:—

**2. In this Act,—**

(a) "Aggregate Value" shall, whether the deceased was domiciled within or outside Ontario at the time of his death, mean:

(1) the fair market value at the date of the death of the deceased of the property wherever situate passing on the death, and

(2) the value as defined by this Act at the date of death of any disposition wherever made where such disposition was made on or after the 1st day of July, 1892,

including bonds, debentures, inscribed stock and other securities of the Province of Ontario issued under any Statute of Ontario exempting them from duty, less the debts, encumbrances, and other allowances authorized by section 3.

(g) "Property" shall include money and real and personal property of every description and income therefrom and every estate and interest in such property and income.

**3. In determining the dutiable value of property passing on the death and of a transmission thereof and of a disposition the fair market value of the property passing on the death and of the property with respect to which there was a disposition shall be taken as at the date of death of the deceased, or at such other time as may be specified by this Act, and allowance shall be made for reasonable funeral expenses, debts and encumbrances, and surrogate court fees (not including solicitor's charges) and any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other subject of property liable thereto; but an allowance shall not be made, . . . .**

**6. At the date of the death of any person,—**

(a) all property situate in Ontario passing on the death of such person, whether such person was at the time of his death domiciled in Ontario or elsewhere;

(b) every transmission within Ontario owing to the death of any person domiciled therein of personal property locally situate outside Ontario;

- (c) every disposition of any property (other than realty situate outside Ontario) made within Ontario by any such person during his lifetime, on or after the 1st day of July, 1892;
- (d) every person to whom a disposition of any personal property (other than the property mentioned in clause g of section 6a) was made after the date of the coming into force of this Act by the deceased in his lifetime outside Ontario, in respect of such personal property, when such deceased person was domiciled within Ontario at the time of such disposition and at the time of his death, and when the person to whom such disposition was made was resident or domiciled within Ontario at the time of such disposition and at the time of the death of the deceased person,

shall be subject to duty at the rates hereinafter imposed.

7.—(1) Subject to the provisions of this or any other Act as to exemption from duty, duty shall be levied and paid for raising a revenue for provincial purposes, whether the deceased was domiciled at the time of his death in Ontario or elsewhere,

- (a) on all property passing on the death and situate in Ontario at such time;
- (b) on all dutiable transmissions;
- (c) on all dutiable dispositions; and
- (d) on all persons mentioned in clause d of section 6;

according to the dutiable value as herein provided, at the following rates, over and above the fees paid under The Surrogate Courts Act,—

1. Where the aggregate value exceeds \$25,000.00,
  - (a) any property situate in Ontario which passes to or for the benefit of the grandfather, grandmother, father, mother, husband, wife, child, son-in-law or daughter-in-law of the deceased;
  - (b) any dutiable transmission to or for the benefit of any of the persons mentioned in subclause a;
  - (c) any dutiable disposition to or for the benefit of any of the persons mentioned in subclause a; and
  - (d) any of the persons mentioned in subclause a who is subject to duty under clause d of section 6;

shall be subject to duty at the rate and on the scale as follows:

(2) The value of a transmission shall be deemed to be the fair market value of the property with respect to which there is such transmission.



**10.—(1)** Every heir, legatee, devisee, or donee, and every person to whom property passes for any beneficial interest in possession or expectancy or in whose favour a disposition is made shall be liable for the duty upon so much of the property as so passes to him and which is dutiable in Ontario according to the provisions of this Act, and shall also be liable for the duty, if any, in respect of any transmission or disposition to him.

**14.—(1)** The duty imposed by this Act, unless otherwise herein provided, shall be due at the death of the deceased and payable within six months thereafter, and, if the same, or any part thereof, is paid within that period, no interest shall be charged or collected thereon, but if not so paid, interest at the rate of six per centum per annum from the death of the deceased shall be charged and collected upon the amount remaining from time to time unpaid, . .

In brief, the Act provides for the taxation of the following,—

(1) Property situate in Ontario valued as at the date of the death of the deceased passing to or for the benefit of certain specified classes of beneficiaries;

(2) Every transmission within Ontario owing to the death of a person domiciled therein of personal property situate outside the province, to or for the benefit of certain specified classes of beneficiaries:

(3) Every disposition of property made within Ontario, except with respect to outside realty; and

(4) Every person to whom a disposition of personal property was made by a domiciled decedent in his lifetime outside Ontario, where the donee was domiciled in Ontario at the time of the disposition and at the time of the death.

Each beneficiary is made personally liable for the duty on so much of the property as passes to him, or in respect of the transmission or disposition to him.

#### **Taxation of Property Situate in Ontario.**

The property situate in Ontario is taxed, whether the deceased was at the time of his death domiciled in the province or elsewhere, to the extent to which it can be shown to pass to or for the benefit of a particular beneficiary or

beneficiaries. As each beneficiary is made personally liable for his share of the tax, and as the rate of taxation applicable to such share depends partly upon the relationship of the beneficiary to the deceased, it is obvious that there are two matters which must be determined before an assessment can be made, namely:—

- (a) The portion of the property passing to or for the benefit of each beneficiary; and
- (b) The relationship, if any, of the beneficiary to the deceased.

The expression 'property' is defined as including money and real and personal property of every description and income therefrom and every estate and interest in such property and income.

It is accordingly the property, as it exists at or immediately prior to the death of the deceased, or an estate or interest therein at that time, that is made subject to the tax, upon the assumption that in every case it is possible to show that such property or a definite aliquot part thereof passes to or for the benefit of the classes of persons mentioned in the statute. Applying the principle of strict construction of a taxing enactment, the onus is upon the taxing authority to identify the particular property or portion thereof which passes to or for the benefit of each beneficiary. In the case of personal property situate in the province, and forming part of the estate of a person dying domiciled outside of the province, the question arises as to how it is possible to satisfy this onus in all the varied circumstances which may occur. If the property forms part of an estate which devolves in its entirety to a sole or universal beneficiary, as in the case of *Alleyne-Sharple v. Barthe, supra*, it would doubtless be quite correct to say that each item of the estate, including the property in the province, passes to that beneficiary. Moreover, in the case of property specifically bequeathed, little difficulty will be experienced in identifying the subject-matter of the taxation. With regard to other classes of bequests by will, however, and particularly in re-

lation to a bequest of residue, difficulties would appear to be unavoidable in the matter of determining what portion of the property in the taxing province passes to or for the benefit of each particular beneficiary. It cannot be said that the property passes directly to a beneficiary or beneficiaries unless in the case of specific and universal bequests. Can it be said to pass generally for the benefit of those interested in the estate? Even if it can be said to so pass, the extent of the benefit remains to be determined, so as to ascertain beyond doubt the share of the tax payable by each beneficiary. In order to be mathematically correct, however, the extent of the actual benefit can only be determined at the time of distribution of the beneficial surplus. Moreover, until such actual benefit has been ascertained, it would seem to be impossible to say what portion of the value of the property as at the time of death passes to or for the benefit of anyone, except in the case of specific and universal devisees. It may be contended that the Ontario Act defines "aggregate value" as being the fair market value of the property at the time of the death, and that each beneficiary must accordingly be presumed to receive a proportionate benefit upon the theory that the estate is immediately distributable at that time. It is obvious, however, that no such theory can be read into the statute, and that it cannot be said to apply unless it is clearly set forth therein. A careful perusal of the Act fails to reveal any such provision, so that the conclusion would seem to be inescapable that where the expression "property passing to or for the benefit" is used in the statute, the word "benefit" must be construed as meaning the actual benefit, and not a benefit of an artificial or theoretical character. Further, the Ontario Act contemplates that the tax shall be ascertained at or shortly after the death, and that it shall be payable within six months after the death. In view of the practical impossibility of arriving at the actual benefit at or within that time, the tax imposed by the Ontario Act, in so far at all events as it relates to residuary benefits, may be found to be incapable of ascertainment, and, therefore, that it is unen-

forceable by reason of the application of the principle of strict construction.

In the judgment delivered by Robson, J.A., in *Re Bennett, Provincial Treasurer v. Bennett* (1936), 2 D.L.R. 291, the learned Judge refers to the difficulty of determining the tax and the persons to be liable therefor until the "benefit" to be derived by each beneficiary has been definitely ascertained. In this connection, he says:—

"This litigation was started at the instance of the Provincial Treasurer under section 21, which says the Judge 'shall hear and determine all questions relative to the liability of the property for duty, the amount thereof, and the persons liable therefor.' The learned Judge in the order now under consideration found that the deposit of \$50,000 was subject to succession duty. He did not determine the amount or the persons liable therefor.

"In fact no judgment could be given declaring any person liable as contemplated. The executors could not be held liable. Section 44 prevents it and, further, to so hold would be to impose indirect taxation. No beneficial interest in the \$50,000 passes to the executors. The beneficiaries cannot be held personally liable. They are not here and the executors could not without more be taken to represent the beneficiaries on a personal claim. But, leaving that aside, the expected acquisitions of the beneficiaries are not ascertained yet, let alone passed to them as far as we know. As far as they are concerned, there may be nothing to tax yet. See *Lord Sudeley v. Attorney-General* (1897), A.C. 11; *Barnardo's Homes v. Special Income Tax Commissioners* (1921) 2 A.C. 1."

#### Transmissions Within the Province.

The expression "transmission within the province" is not defined in the Ontario Act, and its meaning must accordingly be ascertained by reference to other sources of information.

In an American case, *Garland v. Harrison*, 8 Leigh (Va.) 368, the Court had under consideration a statute providing

that bastards should be capable of transmitting inheritance on the part of the mother. Upon the meaning of "transmit" in this connection, Parker, J., said:

"Much criticism has been expended on the word 'transmit', which I shall no further notice than to observe that in its first and original sense it means to send from one person or place to another."

In the same case, Tucker, P., said:

"It is a word of two significations, and is in this passage, I conceive, used in both senses. It implies, in connection with inheritance, the transmission of an estate by descent, either from the bastard or through him. Nothing is more familiar than to speak of a person transmitting from himself. In that sense it means to convey, to transfer, to impart. I transmit money through the mail to Philadelphia . . . In like manner the word is used by lawyers to indicate not only the transmission through a person, but the transmission from him. Blackstone lays down the rules 'whereby property is transmitted from one man to another'. Black, Com. 211."

"In Sir James A. H. Murray's Dictionary, the words "transmit" and "transmission" are defined as follows:—

"Transmit: 1. To cause (a thing) to pass, go, or be conveyed to another person, place, or thing; to send across an intervening space; to convey, transfer. 2. To convey or communicate (usually something immaterial) to another or others; to pass on, especially by inheritance or heredity; to hand down."

"Transmission: The action of transmitting or fact of being transmitted; conveyance from one person or place to another; transference."

In *Alleyne-Sharple v. Barthe*, *supra*, Lord Phillimore comments upon the Quebec statute which imposes taxation upon transmissions in these terms, namely:—

"The conditions there stated upon which taxation attaches to property outside the province are two: (1) That the transmission must be within the Province; and (2) That

it must be due to the death of a person domiciled within the Province. The first of these conditions can, in their Lordships' opinion, only be satisfied if the person to whom the property is transmitted is as the universal legatee in this case was either domiciled or ordinarily resident within the Province; for in the connection in which the words are found no other meaning can be attached to the words 'within the province' which modify and limit the word 'transmission'."

In *Attorney-General for Ontario v. Baby* (1927), 1 D.L.R. 1105; 60 O.L.R. 1; affirming (1926), 3 D.L.R. 928; 59 O.L.R. 181; the meaning of the term "Transmission" was the subject of comment in the judgments delivered by Mulock, C.J.O., and Hodgins, J.A.

Mulock, C.J.O., says: "The Quebec Act taxes transmission. The Ontario Act taxes succession. The conditions which in each case cover the right to tax are substantially the same. But for the observations of Lord Phillimore, I should have inclined to the view that the terms 'transmission' and 'succession', as used in the two Acts, are synonymous. If they are not, then 'transmission' means, I think, giving formal effect to the change of ownership which happens on the death of the former owner, by converting the equitable title of the successor into the legal, and, thus construed, 'Transmission' includes 'succession'."

Hodgins, J.A., discusses the distinction between the terms "succession" and "transmission". Speaking of an Act which imposed taxation "in respect of any succession", he says:

"Now 'succession' is defined in the Act, by section 3, as being something which is conferred on a person upon a death, by reason of a past or present disposition of property, or by any devolution of law by reason whereof such person becomes beneficially entitled. These words 'in respect of any succession' therefore mean in respect to something conferred upon a person upon the death of another, arising out of or depending on a disposition of property or on the general law, apart from individual disposition, and desig-

nated by the statute as a 'succession'. To my mind this legislation deals with something possibly different from, and perhaps less than, what is described by the word 'transmission'. That expression involves a handing over or a passing on of something from one to another, and so may include the means by which that is done—in other words, the instrument of title or its confirmation and effect."

In view of the foregoing quotations, it may be said that the leading characteristics of a "transmission within the province", within the meaning of the Ontario Act are as follows:—

(1) The transmission of the outside personal property must be by reason of the death of a person domiciled in the province at the time of his death;

(2) The transmission must be to a person domiciled or resident in the province at that time;

(3) The property or portion thereof which is transmitted must be identified; and

(4) The terms "transmission" and "succession" are not synonymous, the former involving a handing over or passing on of something one to another, and the latter denoting merely the accession of a title or right in the person benefited, by which a benefit accrues to him.

It is comparatively an easy matter to understand the application of the expression "transmission within the province" to cases where the outside personal property is specifically bequeathed to a beneficiary domiciled or resident within the province, or where the whole estate of the deceased, whether within or without the province, is bequeathed to one beneficiary so domiciled or resident. In *Alleyne-Sharple v. Barthe, supra*, Lord Phillimore discusses the Quebec tax upon transmission, so far as it concerns cases of sole or universal benefits, Dame Margaret Alleyne-Sharple being the universal legatee and executrix of the deceased, and it was held that the tax was valid as relating to a universal transmission of this nature. So far the

Courts have not been called upon to decide upon the application of a tax upon transmission where the bequests under a will are otherwise than specific or of a universal character, and where there are several beneficiaries, some of whom reside within and some without the province.

The principle of strict construction of a taxing enactment makes it incumbent upon a provincial taxing authority to show that the outside personal property of a domiciled decedent, or some portion thereof, is in fact the subject of a transmission within the province before the taxing provisions can be said to be applicable. Is it possible for the taxing officials to satisfy this onus in cases of testamentary benefits, other than such as are specific or universal, where some of the beneficiaries reside within the taxing province and others are resident outside? In other words, can it be determined for purposes of taxation that the outside personal property, or any definite portion thereof, passes or is transmitted to beneficiaries within the province, and particularly so where the interests of residuary beneficiaries are involved? When considering these inquiries, it should be remembered that the taxation is upon the transmission of the actual property itself or of some portion thereof, and not upon the transmission of the beneficial surplus of the estate of the deceased which remains after satisfaction of debts and administration expenses. In fact, none of the provincial enactments make provision for the allowance of administration expenses, except in relation to the actual fees paid to the Surrogate Court.

The impossibility of showing that any particular property passes or is transmitted to any particular beneficiary is well illustrated by the judgments delivered in *Attorney-General v. Sudeley* (1897), A.C. 11; 66 L.J.Q.B. 21; and in *Attorney-General for Nova Scotia v. Delamar*, 54 N.S.R. 497, at p. 508.

In the course of his judgment in the *Sudeley* case, Lord Halsbury says:

"The length of this argument has been in a great measure due to the fallacious use of language as applicable



to the rights of these parties. In a certain sense, a person may have a claim, a person may be entitled to this, that, and the other; but the whole controversy turns upon the character of the particular thing to which the legatee is entitled. With reference to a great many things, it would be quite true to say that she had an interest in these New Zealand mortgages—that she had a claim upon them: in a loose and general way of speaking, nobody would deny that that was a fair statement. But the moment you come to give a definite effect to the particular thing to which she becomes entitled under his will you must use strict language, and see what it is that the person is entitled to; because upon that in this case depends the resolution of the question. The thing that the legatee was entitled to was one-fourth share of a residuary estate, consisting, it may be, of many things; and I think it was fallacious on the part of Mr. Channell to say that the residue was very nearly ascertained, because the question is not only of amount—although I think that of itself would not be sufficient if it were only of amount—but it is a question of substance as well as a question of amount. It is uncertain until the residuary estate has been ascertained of what it will consist. It may consist of many things—it may consist of only a sum of money—and until that has been ascertained the actual right capable of instant assertion does not exist; and whether the character is that of executor or of trustee seems to me to be immaterial, because the legatee had no right to claim this or that particular part of the assets. Now, if the only thing that the legatee is entitled to is the fourth share of an ascertained residuary estate, it is impossible to maintain that the character of any part of that estate can be ascertained so as to make it possess a specific locality, until the residue has been ascertained. It is a condition precedent to know of what the residuary estate will consist. The right of the person to bring an action, or to insist upon the performance of the trust, may be one thing; but the thing itself has to be ascertained, and until it has been ascertained, and until the thing has come into existence, it appears to me the question does not arise.”

The observations of Lord Halsbury, as above quoted, are of importance as determining:—

(1) That it is only in a loose and general way of speaking that any one beneficiary can be said to be interested in any particular property of a decedent; and

(2) The character of any part of a residuary estate cannot be ascertained so as to make it possess a specific locality until the residue has been ascertained.

In view of these observations it is difficult to understand how any provincial taxing authority can determine, as at the time of the death of the deceased, what is a "transmission within the province" in relation to residuary benefits, for the purposes of taxation.

The same difficulty of ascertaining the "transmission" subject to taxation, is commented upon by Harris, C.J., in *Attorney-General for Nova Scotia v. Delamar*, 54 N.S.R. 497, at p. 508, in the following terms, namely:—

"It is, perhaps, necessary to point out that the theory upon which the case was launched by the Crown, which involves a finding that a portion of the shares passed to the defendant, Alice Antoinette Delamar, under the will of the deceased, and the circumstances of the case, seems to be without any foundation in law. I can find no authority for such a proposition, and pressed counsel in vain for it on the argument. The whole of the 5,000 shares passed to the executors, and could have been sold by them, and the proceeds applied in payment of the debts of the deceased, or of any one or more of the legacies, and the defendant could not have prevented such an application of the shares or the proceeds. Williams on Executors, pp. 700 *et seq.* Alice Antoinette Delamar had no right to have those particular shares, or any part of them, set aside as part of the \$10,000,000 trust, and they cannot be said to have passed to her in any sense within the meaning of the Act."

The Ontario Act contemplates that the tax upon the transmission of outside property to a resident beneficiary shall be based upon the value as at the time of the death,

and that the tax shall be ascertained at or shortly after that time. As already indicated, the tax is capable of application in relation to specific and universal bequests. In relation to other classes of benefits, however, and particularly residuary benefits, administrative difficulties may be encountered having regard to the practical impossibility of showing that the outside personal property is actually transmitted either in whole or in part to the beneficiaries domiciled or resident within the province. In these circumstances, the contention may be raised that in relation to these classes of bequests the tax fails or is not ascertainable in consequence of the application of the principle of strict construction.

## **CHAPTER IV.**

### **THE TAX IN NOVA SCOTIA.**

The statute law relating to succession duties in Nova Scotia is contained in The Succession Duty Act, Chapter 18, Revised Statutes of Nova Scotia, 1923, as amended by Chapter 17, Acts of 1924, Chapter 21, Acts of 1929, Chapter 21, Acts of 1932, Chapter 22, Acts of 1935, and Chapter 13, Acts of 1936. The statutory provisions differ from those in force in the other provinces in that the charging sections impose an estate duty on a graduated scale of rates upon the properties passing or deemed to pass on the death, with a proviso that in place of such rates a different scale shall be applicable where the property passes either in whole or in part to or for the benefit of certain classes of beneficiaries. The tax is not confined to property situate in Nova Scotia at the time of the death, but is also imposed upon property situate outside of the province at that time where such property is subsequently brought or sent into the province for administration or distribution. With a view to making the tax more effectively applicable to the outside property it is provided by subsection (4) of section 11 that "it is the duty of an executor or administrator where the deceased was domiciled in Nova Scotia at the time of his death to exercise due diligence to bring or cause to be sent into Nova Scotia to be administered or distributed all personal property forming part of the estate of the deceased and situate out of Nova Scotia at the time of his death."

#### **Constitutionality of the Tax.**

##### **Direct Taxation.**

By section 3 of the Act it is provided that for the purpose of raising a revenue for provincial purposes, and save as in the Act otherwise provided, there shall be levied and paid for the use of the Province a duty (called succession

duty), at the rates specified, upon all property thereafter mentioned which has passed on the death of any person who has died on or since the 1st day of July A.D. 1892, or which passes on the death of any person dying thereafter, the duty to be according to the fair market value of such property as at the date of the death of the deceased.

Section 7 specifies the classes of property upon which duty is to be levied and paid as follows:—

- (a) all property situate in Nova Scotia which has passed as aforesaid or which passes as aforesaid on the death of any person, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere, and debts and sums of money due and owing from persons in Nova Scotia to any deceased person at the time of his death on obligation or other specialty shall be property of the deceased situate in Nova Scotia without regard to the place where the obligation or specialty shall be at the time of the death of the deceased;
- (b) property which has passed as aforesaid or which passes as aforesaid on the death of any person and which is situate out of Nova Scotia on the date of the death and which is brought or sent into Nova Scotia to be administered or distributed, including money received in Nova Scotia by any donee mentioned in this clause under a policy of insurance effected by any person on his life where the policy is wholly kept up by him for the benefit of any existing or future donee, whether nominee or assignee, or for the benefit of any person who may become a donee, or a part of such money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit;
- (c) all shares, stocks, bonds, debentures and other securities, whether heretofore or hereafter issued or made by any corporation whether heretofore or hereafter incorporated by or under an Act of the Legislature of Nova Scotia which have passed on the death of any person as aforesaid or which pass on the death of any person as aforesaid, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere, and which are or were or any interest in which is or was at the time of his death registered or standing in the name of the deceased or in trust for him on a register or book kept for the purpose, whether in Nova Scotia or

elsewhere, and whether such shares, stocks, bonds, debentures or other securities were before the enactment of chapter 30 of the Acts of 1922, validly and effectually transferable or assignable in Nova Scotia or elsewhere; no transfer nor assignment nor devolution by will, intestacy or otherwise of any such shares, stocks, bonds, debentures or other securities in respect of which the Legislature of Nova Scotia has authority in this behalf, and no entry made on any such book or register of any such transfer or assignment or devolution shall be valid or effectual unless and until all succession duty thereon is paid.

Section 10 provides that every person to or for whose benefit any property passes on the death of any other person shall be liable for the duty upon so much of the property as so passes to him.

By section 11 it is provided that no executor shall in the first instance be personally liable to pay the duty on any property which passes on the death of the deceased and to which any person is beneficially entitled. It is further provided, however, that "an executor or other person in whom any interest in any property so passing or the management thereof is at any time vested and any person with whom and any corporation with which any money or other property has been deposited to be held in specie or otherwise for two or more persons so that on the death of one or more of them, any beneficial interest accrues or arises by survivorship on such death, shall not transfer or deliver such property to the person so entitled without deducting therefrom the duty for which such person is liable."

Violation of the provision regarding the transfer of property renders the executor or other person or corporation in default liable to a penalty equal to twice the amount of the duty applicable to such property. Such penalty is recoverable with full costs from any person or corporation liable therefor in any court of competent jurisdiction by an action brought by the Provincial Treasurer in his name of office and such action may be continued by his successor in office as if no change had occurred.

Section 16 of the Act requires an executor to file the usual succession duty affidavit and schedules within three months after the death of the deceased or such later time as may be allowed by the Provincial Treasurer. If the affidavit is not filed within the prescribed time, the Provincial Treasurer may apply to the Court for an order directing the executor to do so within such time as the Court directs.

There is no statutory provision requiring the executor to file a bond securing payment of the duty before the issue of letters probate to him.

It is considered that the tax imposed by the Nova Scotia Act constitutes direct taxation for the following reasons, namely:—

- (1) The tax is imposed directly upon property;
- (2) The beneficiary of the property is the only person who is made personally liable for the payment of the tax;
- (3) There is no liability placed upon the executor or administrator for payment of the tax, but he becomes liable to a penalty if he transfers property without deducting the duty therefrom;
- (4) The executor or administrator is not required to file a bond or other security for payment.

#### **Taxation Within the Province.**

The constitutionality of certain of the provisions of the Nova Scotia Act may be open to question on the ground that such provisions have the effect of imposing taxation which is not within the province.

By section 7(a) of the Act it is provided that debts and sums of money due and owing or accruing due and owing from persons in Nova Scotia to any deceased person at the time of his death on obligation or other specialty shall be property of the deceased situate in Nova Scotia without regard to the place where the obligation or specialty shall be at the time of the death of the deceased. The effect of this provision is to make the situation of specialty debts for

succession duty purposes in Nova Scotia depend entirely upon the residence of the debtor without regard to the place where the specialty contract is found.

It will be observed that the provision ignores the rule laid down in *Hope's* case with regard to the situation of specialty debts, and its validity is open to question on this ground. In the judgment delivered by him in *Smith v. Provincial Treasurer of Nova Scotia*, 47 D.L.R. 108; 58 S.C.R. 570; Anglin, J., dissents from the view that a Provincial Legislature whose powers of taxation are restricted to "taxation within the province" may, for purposes of taxation, give to property a *situs* within the province although according to the general law of the province applicable under the circumstances its *situs* would be outside.

Again, in the judgment of the Supreme Court of Canada in *The King v. National Trust Company* (1933), Can. S.C.R. 670; (1933), 4 D.L.R. 465; Duff, C.J.C., expresses a similar doubt as to the power of the Provincial Legislatures to ignore the rule as to *situs* of specialties. He says: "We think it follows that a Provincial Legislature is not competent to prescribe the conditions fixing the *situs* of intangible property for the purpose of defining the subjects in respect of which its powers of taxation under The B.N.A. Act, 1867, section 92(2) may be put into effect."

By section 7(c) it is provided that all shares, stocks, bonds, debentures and other securities, issued or made by any company incorporated by or under an Act of the Legislature of Nova Scotia, shall be subject to duty irrespective of the place where such securities are registered.

This provision was enacted as the result of the decision of the Supreme Court of Nova Scotia in *Attorney-General of Nova Scotia v. Delamar*, 61 D.L.R. 251; 54 N.S.R. 497. In that case it was held that certain shares of the common stock of the Nova Scotia Steel and Coal Company were not subject to taxation in Nova Scotia as they could be effectively dealt with in New York, where they were registered.



Section 7(c) is considered to be *intra vires* of the Provincial Legislature in so far as it relates to shares and stocks, since by subsection (7) of section 37 of the Nova Scotia Companies Act, 1921, as re-enacted by subsection (7) of section 40 of the Act of 1935, it is provided that on the death of a member registered in a branch register of members, the shares of the deceased member shall be transferable on the duplicate of the branch register at the registered office of the company in Nova Scotia and not elsewhere. The effect of this provision is to make shares of Nova Scotia corporations transferable only in that province upon the death of the registered owner, and subject to taxation accordingly. See *Erie Beach Company v. Attorney-General for Ontario* (1930), 1 D.L.R. 859; affg. (1929), 2 D.L.R. 754; 63 O.L.R. 469; reversing (1928), 1 D.L.R. 739; 61 O.L.R. 507.

While subsection (11) of section 97 of the Nova Scotia Companies Act, 1935, contains a provision as to transfer of debentures upon death similar to that applicable to shares, it is doubtful if this provision makes debentures under seal and similar securities liable to taxation where such instruments are found outside of the province. It is said that the true rule as to the situs of bonds and debentures under seal is that applicable to specialties in general, namely, that such instruments are situate where they are found at the death of the owner. *Royal Trust Company v. Attorney-General of Alberta*, (1930), 1 D.L.R. 868; affg. (1929), 1 D.L.R. 923; 24 A.L.R. 357; *The King v. National Trust Company* (1933), 4 D.L.R. 465; S.C.R. 670; affg. (1933), 2 D.L.R. 474; 54 Que. K.B. 351.

"It was sought to liken," says Lord Merrivale (in the course of the judgment in the *Royal Trust Company's* case), "the bonds to the shares of a joint stock company so as to apply the principle affirmed in *Brassard v. Smith* (1925), 1 D.L.R. 528; 38 Que. K.B. 208; that in the case of such shares the test of local situation is supplied by the question, 'Where could the shares be effectively dealt with?' But these securities were statutory bonds and not shares. The

conditions of the bonds as to registration are in no way analogous to the provisions in articles of association for the incorporation of shareholders in a joint stock company by the entry of their name on the register of shareholders at its authorized place of being."

In view of these observations of Lord Merrivale, it may be possible to contend that section 7(c) of the Nova Scotia Succession Duty Act, in so far as it concerns bonds and debentures under seal, where such instruments are found outside the province, is *ultra vires* of the Provincial Legislature as not constituting taxation within the province.

#### **Property Brought or Sent Into the Province.**

Section 7(b) of the Nova Scotia Act provides that the property upon which succession duty shall be levied shall include property which has passed on the death of any person who has died on or since the 1st day of July, 1892, or which passes on the death of any person dying after the Act comes into operation and which is situate out of Nova Scotia on the date of the death and which is brought or sent into Nova Scotia to be administered or distributed.

Section 9 provides that where any property subject to duty, including the property described in section 7(b), passes on the death of any person the duty on the same shall be at the rates therein prescribed.

Section 13 provides that, unless otherwise provided in the Act, the duty imposed shall be due at the death of the deceased and payable within eighteen months thereafter, and if not so paid interest at the rate of seven per centum per annum from the death of the deceased shall be charged and collected upon the amount remaining from time to time unpaid.

It is questionable if these provisions regarding the taxation of outside personal property brought or sent into the province for administration or distribution can be regarded as constituting direct taxation within the province. The

following reasons may be advanced in support of the view that this particular type of taxation is *ultra vires* of the Provincial Legislature, namely:—

- (a) Section 9 of the Act, which is the charging section, imposes duty on property which passes on the death of any person. In general, "passes" may be taken as meaning "changes hands". *Neville v. Inland Revenue Commissioners* (1924), A.C. 385, per Lord Haldane at p. 389. The duty is accordingly imposed on property as when it changes hands on the death of the owner, and if the property is then without the province, it seems logical to conclude that the taxation is not within the province, notwithstanding the addition of the words in section 7(b) "and which is brought or sent into Nova Scotia to be administered or distributed". What passes must be ascertained at the moment of passing, without reference to any events happening before or afterwards. *Re Cowley's (Earl) Estate* (1898), 1 Q.B. 355, C.A., per Rigby, L.J., at p. 377; *Attorney-General v. Glossop* (1907), 1 K.B. 163, 180, C.A.;
- (b) By section 13 the duties are declared to be due at the date of the death, and are payable within a limited time thereafter. This provision strengthens the view that it is upon the property, with reference to its passing at the moment of death, that the taxation is imposed, notwithstanding that the property is then without the province. As the Legislature is aiming at property outside the boundaries of the province, the tax is objectionable from a constitutional standpoint, notwithstanding the qualification regarding the bringing or sending of the property into the province. In *Lovitt v. The King* (1910), 43 S.C.R., at pp. 143-4, Duff, J. (now C.J.C.), expresses the view that if property is within the province, either actually or constructively at the time of death, taxation upon such property is valid notwithstanding that the tax is declared to be

due at the date of the death. The inference is that this feature of the taxation makes the tax invalid in relation to property outside the province at the time of death;

- (c) In *Provincial Secretary-Treasurer of New Brunswick v. Robinson* (1923), 2 D.L.R. 674; 50 N.B.R. 367; the New Brunswick Supreme Court, Appeal Division, declared the following provision of the New Brunswick Succession Duty Act to be *ultra vires*, namely:— "So far as the legislative authority of the province extends to do so, the following property shall be deemed to be within the province, namely, all property situate outside the province belonging to a person not domiciled therein, if and to the extent that such property shall pass by demise, or on intestacy, or by transfer to a person domiciled therein." The taxation of property situate outside the province if it passes by demise, or on intestacy, or by transfer, to a person domiciled therein, bears a strong resemblance to the provision in the Nova Scotia statute imposing taxation upon outside property passing upon the death which is subsequently brought into the province for administration or distribution. If the New Brunswick statute, considered in the *Robinson* case, is *ultra vires*, it would appear to follow that the provision in the Nova Scotia statute relating to the taxation of property outside of the province is in the same category.

If a tax on the outside property, as imposed by the Nova Scotia Act, is valid, the extraordinary result follows that if a beneficiary obtains possession or control of the property before it reaches the province no tax will be exigible, but otherwise the tax will come into existence immediately the property enters the province.

Subsection (4) of section 11 of the Act provides that "it is the duty of an executor or administrator where the deceased was domiciled in Nova Scotia at the time of his

death to exercise due diligence to bring or cause to be sent into Nova Scotia to be administered or distributed all personal property forming part of the estate of the deceased and situate out of Nova Scotia at the time of his death."

As the domiciliary executor or administrator cannot ordinarily dictate how the foreign personal property is to be distributed, and by whom distribution is to be made, it is difficult to understand how such executor or administrator can fulfil the so-called duty prescribed by this subsection.

Distribution of the outside property may be carried out either by the foreign executor or administrator on his own authority, or, where an administration action has been brought, by or under the direction of the Court. It is, of course, true that the distributable surplus realized upon the administration of the outside property is usually sent to the personal representative of the deceased under the law of the domicile, but it does not follow that because this is the customary method of procedure the foreign administrator is debarred from making distribution directly. See *Eames v. Hacon* (1880), 16 Ch. D. 407; (1881), 18 Ch. D. (C.A.) 347; *In re Kloebe* (1884), 28 Ch. D. 175; *In re Trufort* (1887), 36 Ch. D. 600; *Ewing v. Orr-Ewing* (1885), 9 App. Cas. 34, 40; 10 App. Cas. 453. Where distribution is made by the Court, two alternative courses of action are possible. The Court may hand over the distributable residue to the personal representative of the deceased under the law of his domicile, or it may directly distribute such residue. *In re Lorillard* (1922), 2 Ch. (C.A.) 638.

### Strict Construction.

The statutory provisions which relate to the incidence of the tax in Nova Scotia and the persons liable or accountable therefor are contained in sections 3, 7, 10, 11, and 16 of the Act, to which reference has already been made, and in the following sections, namely:—

2.—(1) In this chapter, unless the context otherwise requires:

(b) the expression "property" includes real property and personal property of every description, whether tangible or intangible, and every estate and interest there-

in and any income therefrom and the proceeds of sale thereof respectively, and any money or investment for the time being representing the proceeds of sale;

(g) the expression "aggregate value" means the value of all the property passing on the death of the deceased, including the value of property so passing and situate out of Nova Scotia such aggregate value being determined as provided by this chapter;

(h) the expression "dutiable value" means the value of property subject to duty, such dutiable value being determined as provided by this chapter.

3.—(2) Property passing on the death of the deceased shall be deemed to include for all purposes of this chapter the property following, whether the same is situate in Nova Scotia or elsewhere, that is to say:

(Here follows detailed particulars of the properties deemed to pass on the death.)

5. In determining the aggregate value of property the fair market value shall be taken as at the date of the death of the deceased of all property passing on his death, including the value of property situate out of Nova Scotia, and a deduction or allowance shall be made of the deductions and allowances hereinafter mentioned in respect of dutiable value.

6.—(1) In determining the dutiable value of property the fair market value shall be taken as at the date of the death of the deceased of property subject to duty, and a deduction shall be made as provided in this section for reasonable funeral expenses, debts and encumbrances, and for fees of any Probate Court in Nova Scotia (not including solicitor's charges or probate, death, estate, inheritance or succession duty or tax or other like duty or tax); but a deduction shall not be made,—

(Here follows particulars of debts and other items for which no allowance is made.)

9. Where any property subject to duty passes on the death of any person the duty on the same shall be at the rates following:—

If the aggregate value of the property passing on the death of such person

(a) exceeds \$5,000.00 but does not exceed \$10,000.00 at the rate of \$10 for every \$100 of the dutiable value;

(b) exceeds . . . .

Provided that in place of said rates,—

(1) Where any property subject to duty passes on the death of any person either in whole or in part to or for the benefit of the grandfather, grandmother, father, mother, husband, wife, child, grandchild, daughter-in-law or son-in-law of the deceased or where any such property passes on the death of any person and is devised or bequeathed either in whole or in part for religious, charitable, or educational purposes, to be carried out in Nova Scotia the duty on the same or so much thereof as so passes shall be at the rates following:—

If the aggregate value of the property passing on the death of such person

(a) exceeds \$25,000.00 but does not exceed \$50,000.00 at the rate of \$2.50 for every \$100 of the dutiable value;

(b) exceeds . . . .

In the judgment delivered by him in *Attorney-General for Nova Scotia v. Delamar*, 54 N.S.R. 497, at p. 508, Harris, C.J., makes certain observations regarding the impossibility of showing that any particular property passes to or for the benefit of any one beneficiary. Recognizing that the tax might be held to be invalid on this ground, by reason of the application of the principle of strict construction, the Nova Scotia Legislature altered the statute law to provide for the imposition of duties upon an alternative basis as follows:—

(1) By section 9 the duty is imposed primarily on the property passing on the death, without reference to the persons benefiting by reason of such passing, thus making the tax an estate duty instead of a succession duty.

(2) By a proviso to section 9 it is enacted that in place of the estate duties thus imposed other duties shall be applicable where any property subject to duty passes on the death of any person either in whole or in part to or for the benefit of certain specified classes of beneficiaries.

In the course of his judgment in the *Sudeley* case, *supra*, Lord Halsbury says that each beneficiary may be said to benefit in respect of property passing on the death of a deceased person or to have an interest therein in a loose and general way of speaking. This being so, the question arises under what circumstances the estate duty imposed

by the Nova Scotia Act would be chargeable. In almost every case it can be shown that property does pass to or for the benefit of the classes of beneficiaries mentioned in the statute, either directly to specific or universal legatees, or to the other beneficiaries "in a loose and general way of speaking", to quote the language used by Lord Halsbury. Assuming that the estate duty is inapplicable to an estate, the difficulty mentioned in the *Delamar* case remains, and that is, the impossibility of showing that any particular item of estate property passes to or for the benefit of any one beneficiary, save in the cases of specific and universal bequests. Notwithstanding the amendments made in the statute law, therefore, it may be possible in certain circumstances to contend that the tax fails or is incapable of being ascertained by reason of the application of the principle of strict construction.

#### The Tax in Prince Edward Island.

The Prince Edward Island Act resembles, in its main features, the provisions of the Nova Scotia statute, except that the duty is not imposed upon an alternative basis. The properties declared to be subject to duty are those which pass to or for the benefit of the classes of beneficiaries mentioned. Moreover, the provision subjecting stocks and securities of corporations to taxation differs in an important respect from that in force in Nova Scotia. In Prince Edward Island this provision covers the securities of all corporations, irrespective of the place of incorporation, whereas the corresponding provision of the Nova Scotia Act only relates to securities of companies incorporated in that province. It is considered that the Prince Edward Island Act is *ultra vires* so far as it relates to or concerns the securities of outside corporations to the following extent, namely:—

- (a) The stocks and shares of outside corporations which are registered and transferable outside of the province; and



- (b) The bonds and debentures of outside corporations which are under seal and are found outside the province at the time of the death of the owner.

With regard to the bonds and debentures of domestic companies, the validity of the provision subjecting these securities to taxation is somewhat doubtful in circumstances where the instruments can be described as specialties and are found outside of the province at the time of the death.

## **CHAPTER V.**

### **THE TAX IN NEW BRUNSWICK.**

The law regarding succession duties in the Province of New Brunswick is governed by The Succession Duty Act, being chapter 12 of the Statutes of New Brunswick, 1934, as amended by chapter 40 of the Statutes of 1935.

The duties imposed thereby are divided into three classes, as follows:—

(1) A duty upon property situate within the province passing to a person for any beneficial interest;

(2) A duty or tax upon every person domiciled or resident within the province to whom passes, under the law of the province, on the death of a person domiciled or resident therein, a beneficial interest in personal property situate without the province; and

(3) A duty or tax upon a person domiciled or resident in the province who receives within the province as assignee or nominee, a beneficial interest in money payable under a policy of life insurance or of accident insurance upon the life of a person who was resident within the province at the time of his death, where the policy was wholly kept up by the deceased for the benefit of an existing or future donee.

### **Constitutionality of the Tax.**

#### **Direct Taxation.**

By section 8 of the New Brunswick Act it is provided that all property of a deceased person situate within the province passing to any person for any beneficial interest shall be subject to duty on the dutiable value thereof, and the amount of duty payable shall be calculated at the rate or rates thereafter fixed upon the dutiable value of the property passing to the beneficiary.

Section 10 provides that every person domiciled or resident within the province to whom passes, on the death of a person domiciled therein at the time of his death, any beneficial interest in any personal property of the deceased situate without the province shall pay duty on the dutiable value thereof, and the amount of duty payable shall be calculated at the rate or rates thereafter fixed upon the dutiable value of the property passing to the beneficiary.

Section 12 provides that where any person domiciled or resident within the province receives within the province as assignee or nominee any beneficial interest in any money payable under a policy of life insurance or a policy of accident insurance upon the life of a deceased who was domiciled or resident within the province at the time of his death, and where the policy was wholly kept up by the deceased for the benefit of any existing or future donee, then, if no duty is otherwise payable under the provisions of the Act in respect thereof, that person shall pay duty on the dutiable value thereof, and the amount of duty payable shall be calculated at the rate or rates thereafter fixed upon the dutiable value of the property passing to the beneficiary.

By section 15 it is provided that every person to whom property passes on death for any beneficial interest in possession or expectancy shall be liable for the duties in respect of so much of the property as so passes to him.

Section 43 prescribes the extent of the responsibility of the executor with reference to succession duty in the following terms, namely:—

**43.—(1)** Every sum of money paid to an executor, administrator, or trustee for the duty on any property or retained by him for such purpose shall be paid by him forthwith to the Treasurer or as the Minister may direct.

**(2)** Such executor, administrator, or trustee shall, for the purpose of the collection and payment of any duty which under the provisions of this Act it is his duty to collect and pay over to the Treasurer, be deemed to be an officer of the Province for the collection thereof.

These provisions of the New Brunswick Act indicate clearly that the taxation imposed is direct in character. The duties are imposed directly upon property or persons, and the beneficiaries of the property are the only persons who are made liable for the payment thereof. There is no absolute requirement that a bond be furnished by the executor or administrator before the issue of letters, although it is provided by section 34 that the Minister may accept from any person tendering the same any security satisfactory to the Minister for securing the payment of the duties. The executor or administrator is required to act as a revenue officer for the collection of the duties. By section 47 of the Act he is prohibited from transferring estate property until proper provision has been made for payment of the duty, and if he ignores this provision he becomes liable to a penalty equivalent to twice the amount of the duty payable in respect of the property transferred. It cannot be said, however, that this provision makes him personally liable for payment of the duties in the sense that he must pay them out of his own funds in the expectation that he shall be recouped by the beneficiaries.

### **Taxation Within the Province.**

There may be some doubt as to the constitutional validity of section 12 of the New Brunswick Act. This section provides that where any person domiciled or resident within the province receives within the province as assignee or nominee any beneficial interest in any money payable under a policy of life insurance or a policy of accident insurance upon the life of a deceased who was domiciled or resident within the province at the time of his death, and where the policy was wholly kept up by the deceased for the benefit of any existing or future donee, then, if no duty is otherwise payable under the provisions of the Act in respect thereof, that person shall pay duty on the dutiable value thereof.

In brief, this section taxes a resident beneficiary in respect of moneys payable under insurance policies where

payment is received within the province, and where duty is not otherwise payable under the Act in respect thereof. The reference to duty being otherwise payable is doubtless to section 8, which makes provision for taxing property situate in the province, including life insurance policies so situate. Section 12 must accordingly refer exclusively to payments made under life insurance policies in the province, notwithstanding that the policies, regarded as simple contract or specialty debts, are situate outside of the province, as at the time of the death of the deceased person. The taxation of a resident in respect of money paid to him upon an outside obligation would seem to be scarcely distinguishable from a tax imposed directly upon the obligation. So regarded, it may be contended that the imposition is upon something which is not within the province, and that it is accordingly *ultra vires* of the Legislature. If this contention is not tenable, then policies of insurance may be subjected to taxation in two provinces, namely, the province in which the debt is situated, and the province in which the beneficiary receives payment of the insurance.

### Strict Construction.

The statutory provisions so far as they relate to the incidence of the tax, and the persons liable or accountable therefor, are contained in sections 8, 10, 12, 15 and 43, which have already been quoted, and in the following sections, namely:—

3. In this Act, unless the context otherwise requires,—

- (c) "Dutiable value" with reference to the property passing to a beneficiary or to the beneficial interest of any person means the value of the property or of the interest in the property of the deceased passing to that person after exemptions and allowances to the extent and in the manner authorized by this Act are deducted therefrom;
- (g) "Net value" means the aggregate value of the property of the deceased wherever situate and whether within or without the province passing on his death, after allowances to the extent and in the manner authorized by this Act are deducted therefrom;

- (h) "Passing" or "passing on death" means passing either immediately on the death of a person, or after an interval either certainly or contingently, and either originally or by way of substitutive limitation, and "passes" shall have a corresponding meaning;
- (i) "Property" includes property of every description and every estate or interest therein or income therefrom capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives.

4.—(1) For all the purposes of this Act the following property shall be deemed to be property of the deceased and to be property passing on his death: (Here follows particulars of the properties deemed to pass on the death.)

5.—(1) In determining the net value of the property of the deceased, and, subject to the other provisions of this Act, in determining the dutiable value of the beneficial interest of any person therein, the value shall be taken as at the date of the death of the deceased, and allowance shall be made for (here follows particulars of the allowances which may be made).

10. The amount of duty payable under and in accordance with the provisions of sections 8, 10 and 12 shall be computed, fixed and determined according to rates and conditions, as follows:—

(1) When any property passes either in whole or in part on the death of any person to or for the use or benefit of the father, mother, husband, wife, child, daughter-in-law or son-in-law, the duty payable on or in respect of the property so passing shall be as follows:—

If the net value of the property passing on the death of such person:

(a) Exceeds, etc."

There are provisions similar to section 16 with respect to other classes of beneficiaries.

20.—(1) Unless it is otherwise specifically provided, every duty imposed by this Act shall be due and payable at the death of the deceased, and if the same or any part thereof is paid within six months thereafter, no interest shall be charged or collected upon the amount so paid, otherwise interest at the rate of five per centum from the death of the deceased shall be charged and collected upon the amount remaining from time to time unpaid."

It is thought that difficulties may be encountered in the administration of these provisions for the following reasons, namely:—

(1) The provisions are based upon the erroneous assumption that it is possible, in all cases, to ascertain the beneficial interest in property of a deceased person passing to the several beneficiaries as at the time of the death of the deceased; and

(2) The expression "property" is defined in the Act as meaning the property in the form as it exists at or immediately prior to the death of the deceased, and while it may be true that the beneficiaries have an interest in that property in a loose and general sense, particular portions thereof cannot be said to pass to any particular person or persons for a beneficial interest, except possibly in the case of specific and universal bequests.

Under section 8 of the Act the incidence of the taxation is upon property situate in the province, and under sections 10 and 12 the incidence is upon persons domiciled or resident within the province. These provisions would appear *prima facie* to constitute taxation within the province. The difficulty in both cases, however, is that the tax is based on the thesis that it is possible to identify the property or portions of the property as passing to a particular beneficiary or beneficiaries. Section 15 makes each beneficiary liable for the duties in respect of so much of the property as passes to him. In the case of residuary bequests, what actually does pass to the beneficiaries is not any specific property but a share in the distributable surplus when such surplus has been ascertained and has come into existence.

The possibility that the assessment of the duties imposed by the Act, as at the time of the death of the deceased, may be found to be impracticable is referred to in the judgment delivered by Robson, J.A., in *In re Bennett, Provincial Treasurer v. Bennett* (1936), 2 D.L.R. 291. This was an appeal to the Manitoba Court of Appeal by foreign executors from the judgment of Montague, J., allowing the claim

of the province for succession duty in respect of a bank deposit receipt given by the Royal Bank of Canada, Winnipeg, for the sum of \$50,000.00. On August 14, 1934, Russell M. Bennett, a resident of Minneapolis, Minnesota, deposited \$50,000.00 with the Winnipeg branch of the Royal Bank of Canada, when he was given a deposit receipt, stated on its face to be negotiable. Mr. Bennett died at Minneapolis on October 31, 1934. Among his effects and in his possession at the time of his death was this deposit receipt. He died domiciled in the State of Minnesota. By his will he appointed his wife and three sons executors and vested in them his estate upon the trusts and conditions set out therein. The estate had a declared value in excess of \$1,000,000.00, including the deposit. The Province of Manitoba claimed \$8,671.09 as succession duty in respect of the deposit and interest. The claim was allowed by Montague, J. In an affidavit by the executors it was stated that the deposit receipt had been reduced by them into their possession in the State of Minnesota.

The Court of Appeal held that the deposit receipt being negotiable on its face, was a specialty debt, not one of simple contract, having its situs at the place where found on the owner's death. It was further held that the authority of the executors within Manitoba under the Minnesota probate to enforce payment of the deposit was settled by *Prescott v. Crosby* (1922), 68 D.L.R. 250; 32 Man. R. 108; affirmed (1923), 2 D.L.R. 937; and that payment could be enforced clear of any claim for succession duty by the Province of Manitoba.

Robson, J.A., expressed the opinion that, apart from the question of situs, the benefits had not been ascertained, and it was not possible to determine the amount of duty payable and the persons liable therefor. In this connection he says:

"In fact no judgment could be given declaring any person liable as contemplated. The executors could not be held liable. Section 44 prevents it and, further, to so hold would be to impose indirect taxation. No beneficial interest in the \$50,000.00 passes to the executors. The beneficiaries cannot



be held personally liable. They are not here and the executors could not without more be taken to represent the beneficiaries on a personal claim. But, leaving that aside, the expected acquisitions of the beneficiaries are not ascertained yet, let alone passed to them so far as we know. As far as they are concerned, there may be nothing to tax yet. See *Lord Sudeley v. Attorney-General* (1897), A.C. 11; *Barnardo's Homes v. Special Income Tax Commissioners* (1921), 2 A.C. 1."

The New Brunswick Succession Duty Act, as well as the Acts in force in the provinces of Manitoba and Alberta, and in the Yukon Territory, are based on the assumption that it is possible to combine an estate duty and a succession duty in one and the same enactment. Estate duty differs from succession duty in that what is taxable is that which passes at a death and not that to which the survivor succeeds. In many cases the two are identical, but this is not always the case, and particularly so where residuary benefits are involved. This combined system of taxation may accordingly be found to be unworkable in practice.

*In re Cowley's Estate* (1898), 1 Q.B. 355, Smith, L.J., said: "It is not upon the value of what the man succeeds to that the estate duty is to be levied . . . The Finance Act makes liable to estate duty the value of the estate which passes and not the value it may be to any individual successors."

In *Attorney-General v. Penryhn* (1900), 83 L.T. 103, Grantham, J., refers to estate duty in these terms: "It is not the interest which some person succeeds to on a death, which many persons think is the subject of taxation, but it is the interest which ceases by reason of the death."

### **The Tax in Manitoba, Alberta, and the Yukon Territory.**

The taxation imposed by the statutes of Manitoba, Alberta, and the Yukon Territory, follows the same general lines as that imposed in New Brunswick.

In Manitoba the tax upon persons resident in the province in respect of the receipt of insurance moneys is ex-

tended to persons who become entitled to receive the moneys within the province. As the provision relates to insurance debts situate outside the province, it is difficult to understand on what basis the beneficiary could be considered to be entitled to receive payment within the province.

In Alberta, the provision with respect to persons resident or domiciled in the province to whom passes a beneficial interest in outside property, differs from the provision in the New Brunswick statute in that the tax is imposed upon persons in respect of the transmission of the beneficial interest and not in respect of the interest directly. This wording might be considered to make the tax ascertainable in all cases, within the rule of strict construction, if the statute otherwise displayed an intention to defer the actual assessment until the time of distribution of the estate assets. This is not so, however, as section 32 of the Act indicates that the duty is to be due and ascertainable as at the time of death. Moreover, it is provided by section 6 that in determining the dutiable value of the beneficial interest in property, the value shall be taken as at the date of the death of the deceased. While property is capable of being valued as at the date of death, it is scarcely possible to value a beneficial interest at that time particularly in cases where the interest is not ascertainable until the time of distribution.

## **CHAPTER VI.**

### **THE TAX IN BRITISH COLUMBIA.**

By the British Columbia Succession Duty Act, duty is imposed upon property and persons as follows:—

- (a) All property of a deceased person, whether he was at the time of his death domiciled in the province or domiciled elsewhere, situate within the province, passing to any person for any beneficial interest; and
- (b) Persons domiciled or resident in the province, in respect of the transmission to them of a beneficial interest in personal property situate without the province, where such beneficial interest passes under the law of the province, and where the deceased person was at the time of his death domiciled in the province.

The expression "property" is defined as including real and personal property of every description and every estate or interest therein capable of being devised or bequeathed by will, or of passing on the death of the owner.

Certain properties are deemed to pass on the death for the purposes of the Act similar to those so deemed to pass in the other provinces.

#### **Constitutionality of the Tax.**

##### **Direct Taxation.**

The provisions of the Act which affect the question as to whether or not the taxation imposed thereby can be regarded as direct taxation are as follows:—

**10.—(1)** The duties imposed by this Act shall be deducted from the share of each person entitled to share in the estate according to the rate applicable as aforesaid to that person's share.

(2) Every person domiciled or resident in the Province to whom property situate within the Province subject to any duty imposed by this Act passes shall be personally liable for the duty.

(3) Every person by whom any duty imposed by this Act in respect of a transmission is payable shall be personally liable therefor.

**22.—**(1) The Minister may accept security from any person tendering the same for securing the payment of the duty imposed by this Act in any case, or of any part of that duty.

(2) The security, if by way of a bond or guarantee, shall be in such form, for such sum, and with such sureties or otherwise as the Minister may approve, and, if by way of the deposit of securities, shall be of such character and valuation and subject to such terms as he may approve; and the security shall be deposited in the Treasury at Victoria.

**27.—**(1) Every executor or administrator having in his possession or charge any property in respect of which or in respect of the transmission of any beneficial interest in which any duty imposed by this Act is payable shall deduct the duty therefrom or collect the duty from the person liable therefor; and no executor or administrator shall pay over or deliver that property to any person until the duty has been so deducted or collected. Every executor or administrator who pays over or delivers any property in contravention of this subsection shall be liable on summary conviction, to a fine not less than the amount of the duty and interest payable in respect of that property and not more than twice that amount, and, in default of immediate payment, to imprisonment for not less than one month nor more than six months.

(2) Every executor or administrator who deducts, collects, or receives any sum of money for the duty imposed by this Act in respect of any property or transmission shall pay the same forthwith to the Minister at Victoria, or as may be subject to the regulations direct, and shall for the purpose of the collection and payment over of any duty pursuant to the provisions of this section be deemed to be a revenue officer for the collection thereof, within the meaning of the "Revenue Act".

(3) Every executor or administrator who deducts, collects, or receives any sum of money for the duty imposed by this Act in respect of any property or transmission shall be deemed to hold the same in trust for His Majesty and for the payment over of the same in the manner and at the time provided under this section; and the amount thereof shall until paid form a lien and

charge on the entire assets of the estate of the executor or administrator in the hands of any trustee, having priority over all other claims of any person.

**29.** No executor, administrator, or trustee shall be personally liable for the duties imposed by this Act; but an executor, administrator, or trustee having in his possession or charge any property in respect of which any duty imposed by this Act is payable may be required by the Minister to pay the duty out of the property, and if he fails so to do he may be sued in his representative capacity for the amount of the duty, and any judgment recovered against him in that capacity shall be executed only against the property so in his possession or charge.

**31.—(1)** No foreign executor or administrator shall assign or transfer any stocks, debentures or shares in the province standing in the name of a deceased person, or in trust for him, in respect of which duty is payable under this Act until the duty is paid to the Minister or security given as authorized by section 22, and any corporation allowing a transfer of any stocks, debentures or shares contrary to this section shall be liable to pay the duty payable in respect thereof, and interest thereon (if any).

The provisions of the statute as above quoted show that the taxation is direct in character. The beneficiary is the only person who is made personally liable for payment of the duty. While the Minister may accept security for payment, there is no section requiring an executor or administrator to furnish a bond prior to the issue of letters. Section 29 provides that an executor or administrator is not personally liable, but that he may be required to pay the duty out of the property in his possession. If he fails to do so, he can only be sued in his representative capacity, and any judgment recovered against him in that capacity can only be executed against the estate property.

### **Taxation Within the Province.**

Section 7 of the Act imposes a duty upon resident beneficiaries in respect of the transmission to them under the law of the province of a beneficial interest in personal property situate without the province, where the deceased person was at the time of his death domiciled in the province. It is noteworthy that the tax is upon the person in respect of

the "transmission", and not in respect of the "transmission within the province", which was the expression dealt with in the judgment of the Judicial Committee in *Alleyne-Sharple v. Barthe, supra*. The Legislature evidently considered it was not necessary to use the words "within the province", as the tax is confined to resident beneficiaries. It may be contended, however, that the word "transmission" should be construed as meaning a completed transfer, and that, understood in this sense, the legislation is *ultra vires* so far as it relates to persons resident within the province at the time of the death, but who subsequently acquire a residence or domicile elsewhere before the property is actually transferred. If such a construction is not admissible, a tax upon such persons would nevertheless be difficult of enforcement in circumstances where they have acquired the outside property without having first paid the duty.

### Strict Construction.

The statutory provisions so far as they relate to the incidence of the tax, and the persons liable or accountable therefor, are contained in sections 10, 22, 27, 29 and 31, to which reference has already been made, and in the following sections, namely:—

2.—(1) "Dutiable value", with reference to the property or the transmission of a beneficial interest in property passing to any person in respect of which duty is imposed by this Act, means the value of the property or the beneficial interest in property of the deceased passing to that person after the allowances authorized by section 3 are deducted therefrom:

"Net value" means the value of all the property of the deceased, wherever situate, both within and without the province, after the allowances authorized by section 3 are deducted therefrom:

"Passing" or "passing on death" means passing under a will, intestacy, or otherwise, either immediately on the death of a person or on the expiration of an interval thereafter, either absolutely or contingently, and either originally or by way of substitutive limitation, and shall include cases in which property of the deceased is by virtue of subsection (2) deemed to be property passing on his death; and "passes" shall have a corresponding meaning:

"Property" includes property of every description and every estate or interest therein or income therefrom capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives.

(2) For all purposes of this Act, the following property shall be deemed to be property passing on his death: (here follows detailed particulars of the properties deemed to pass on death).

3.—(1) In determining the net value of the property of the deceased, or the dutiable value of property or of the transmission of a beneficial interest in property, the fair market value shall be taken as at the date of the death of the deceased, but subject, in case of any future or contingent income or interest, to the provisions of section 19, and a deduction or allowance shall be made as provided in this section for reasonable funeral expenses (not to exceed five hundred dollars), debts, and encumbrances, and for probate duty, but an allowance shall not be made, . . . .

6.—(1) All property of a deceased person, whether he was at the time of his death domiciled in the province or domiciled elsewhere, situate within the province passing to any person for any beneficial interest shall, except as provided in section 5 be subject to duty on the dutiable value thereof at the rate prescribed in the Table of Rates in Schedule C, as ascertained according to the following method, . . . .

7.—(1) Where the deceased person was at the time of his death domiciled in the province, and where the property of the deceased comprises any personal property situate without the province in respect of which any beneficial interest passes under the law of the province to a person who is domiciled or resident in the province, that person shall, except as provided in section 5, pay duty in respect of the transmission to him of that beneficial interest calculated on the dutiable value thereof at the rate prescribed in the Table of Rates in Schedule C, as ascertained according to the following method, . . . .

11. The duties imposed by this Act, unless otherwise herein provided for, shall be due and payable at the death of the deceased, and if the same are paid within six months no interest shall be charged or collected thereon, but if not so paid, interest at the rate of six per centum per annum shall be charged and collected from the death of the deceased.

The effect of these provisions is that the object or subject of the duties imposed are as follows:—

- (a) Property of a non-domiciled decedent situate in the province passing to any person for any beneficial interest; and
- (b) Beneficiaries resident or domiciled in the province in respect of the transmission to them of a beneficial interest in personal property situate outside of the province, which interest passes to them under the law of the province on the death of a person dying domiciled in the province.

Section 3 of the Act contemplates that the dutiable value of the property, or of the transmission of a beneficial interest in property, shall be determined as at the time of the death, and duty assessed according to the values obtaining at that time. Section 11 makes the duties due and payable at the death.

In view of these provisions it is difficult to explain the following comments made with reference to the Act by Macdonald, J.A., when delivering judgment *In re Estate of Helen F. M. Drummond, deceased*; *Minister of Finance for British Columbia v. Drummond et al.*, 50 B.C.R. 485, at p. 489:

“By section 11 the duties are made payable at the death although in working out the Act and in the administration of the estate in working out the Act and in the administration of the estate it is not, I assume, demanded (or in fact ascertained) at that time.”

Notwithstanding these observations, it is considered that the Act contemplates the ascertainment of the values of the property and beneficial interests in the property as at the time of death, and the assessment of duties by reference to such values as at that time. The same principle of determining values as at the time of death applies with respect to future or contingent interests, except that an election is given to the persons accountable to have the duties assessed on the values obtaining at a later date.



The taxation of property situate in the province and forming part of the estate of a non-domiciled decedent depends upon it being shown that such property passes to a person or persons for a beneficial interest. For the reasons already outlined in discussing the provisions of the Ontario Act, it may be difficult for the officials administering the Act to establish in all cases the exact nature and extent of the beneficial interest of the several beneficiaries in the property as at the time of the death.

The taxation of the beneficiaries in respect of the transmission to them of a beneficial interest in the outside personal property of a domiciled decedent is based upon the theory that it is always possible to determine what that interest is at the time of the death and to value it as at that time. For the reasons already stated, there are practical difficulties in the way of applying this theory so far as it relates to or concerns residuary benefits.

## **CHAPTER VII.**

### **THE TAX IN SASKATCHEWAN.**

By the Saskatchewan Succession Duty Act it is provided that there shall be levied and paid for the purpose of raising a revenue for provincial purposes the duties therein set forth upon or in respect of the following:

- (a) in respect of the succession to all real property in the province, and in respect of the succession to all moveable or personal property wheresoever situate, by way of condition upon or as an incident of the accession to the benefits of the succession, where the deceased was at the time of his death domiciled in the province.
- (b) on property passing on the death and situate in the province, where the deceased was at the time of his death domiciled outside of the province; and
- (c) on property passing on the death and situate in the province, where the deceased was at the time of his death domiciled in the province, and where the property is not included in the property the subject matter of the succession.

The expression 'property' is defined as including real and personal property of every description and every estate and interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.

By subsections (1) and (2) of section 3 of the Act it is provided as follows:

**3.—(1)** Every past or future disposition of property whereby any person has or shall become beneficially entitled, either immediately or after an interval, either certainly or contingently, and either originally or by way of substitutive limitation, to any prop-

erty or the income thereof, upon the death, after the twenty-first day of November, 1903, of any person domiciled in Saskatchewan, whether the death has heretofore happened or shall hereafter happen, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person so domiciled to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession" and the term "successor" shall denote the persons so entitled.

(2) Where a successor has become entitled or claims to be entitled to property passing on the death of a deceased person, who at the time of his death was domiciled in the province, and such title or claim to such title is derived from or is based upon a devolution by or under the law of the province, or upon a past or future disposition of property made by such deceased person within the meaning of the preceding subsection, such successor, or the executor or other person on behalf of the successor, shall pay a duty or tax by reason of having acquired such title or having a claim thereto, which duty or tax is described in this Act as "a duty or duties in respect of the succession", and is imposed at the rate or rates hereinafter set forth by way of condition upon or as an incident of the accession to the benefits of the succession.

Section 5 provides that the property passing on the death of the deceased shall be deemed to include for all purposes of the Act certain properties other than the property owned by the deceased at the time of his death. These properties may be briefly described as follows:—

- (1) Property transferred in contemplation of death;
- (2) Donations *mortis causa* and gifts *inter vivos*;
- (3) Property held jointly;
- (4) Property passing under settlement;
- (5) Annuities and other interests purchased or provided by the deceased;
- (6) Policies of insurance; and
- (7) Property of which the deceased was at the time of his death competent to dispose.

## Constitutionality of the Tax.

### Direct Taxation.

The provisions of the Act which affect the question as to whether or not the taxation imposed thereby can be considered to be direct taxation, are as follows:

**24.—(1)** Every heir, legatee, donee or other successor and every person to whom property passes for any beneficial interest in possession or in expectancy shall be liable for the duty upon so much of the property as so passes to him, or the duty in respect of the succession to so much of the property as so passes to him, as the case may be, and shall, within six months after the death of the deceased or such further time as the Attorney-General may allow, make and file with the clerk of the surrogate court of the district in which the deceased has a fixed place of abode, or in which the property or any part thereof is situated, a full, true and correct statement in duplicate under oath showing:

(a) a full itemized inventory in detail of all the property passing on the death of the deceased person, including any property situated outside of Saskatchewan and the fair actual value thereof on the date of his death;

(b) the several persons to whom the same passes, their places of residence and the degrees of relationship, if any, in which they stand to the deceased.

(3) Before the issue of letters probate or letters of administration or any other grant of letters made by a surrogate court in the estate of a deceased person and within twelve months after the death of the deceased, or such further time as the Attorney-General may allow, and before the resealing of any grant of probate or administration or other similar grant made by a court outside of Saskatchewan, a statement under oath similar to that required by subsection (1) shall be made in duplicate by the applicant, or where there are two or more applicants by all the applicants, and filed with the clerk of the surrogate court of the district in which application is made.

**25.—(1)** If the duty has not been paid by the successors or if security by a deposit of money has not been given, the applicant or applicants shall, in consideration of the grant being made, furnish a bond in such amount as the Attorney-General may determine, the said bond to be executed by the applicant or applicants and either two sureties to be approved by the clerk of the surrogate court or a guarantee company approved by the Lieutenant-Gov-

error in Council under the provisions of The Guarantee Companies Securities Act, and to be conditioned for the due accounting to His Majesty for any succession duty with which the property of the deceased is chargeable, or for any succession duty in respect of the succession to such property, in default of payment being made by the persons liable therefor.

(2) The Attorney-General may accept a sufficient sum as security for the due payment of any duty in lieu of or in addition to any other security, if he is furnished with a written agreement, executed by the applicant or applicants, that in consideration of the grant being made, the money so deposited may, at the expiration of twelve months from the death of the deceased, be applied by the Attorney-General towards satisfying the succession duty, in default of payment within that time by the persons liable therefor.

(3) The Attorney-General may accept bonds of the Province of Saskatchewan as security for the due payment of any duty in lieu of or in addition to any other security, if he is furnished with:

- (a) a written agreement, executed by the applicant or applicants, that in consideration of the grant being made, the bonds so deposited may, at the expiration of twelve months from the death of the deceased, be delivered by the Attorney-General to, and sold by the Provincial Treasurer, and the proceeds applied towards satisfying the succession duty, in default of payment within that time by the persons liable therefor; and
- (b) where the bonds are registered securities, a transfer executed by the executor in favour of the Provincial Treasurer, such transfer to be returned to the executor if the succession duty is paid within twelve months from the death of the deceased.

(4) The preceding subsections shall not apply to estates in respect of which no succession duty is payable or estates in which the applicant to the Surrogate Court is an official administrator or acting in that capacity or where the applicant is a trust company approved by the Lieutenant-Governor in Council under the provisions of The Trust Companies Act or of any Act or ordinance which that Act replaces. Where the applicants are a trust company so approved and an individual, the said provisions shall apply with this qualification that the bond required by subsection (1) shall be furnished by the individual applicant.

**§1.—**(1) No executor or trustee shall be personally liable to pay the duty imposed by this Act upon the property passing on the death of a deceased person, or the duty imposed in respect of the

succession to property. Nevertheless the executor or trustee may be required to pay such duty out of the property or money in his possession belonging or owing to the beneficiaries, and, if he fails to do so within a period of twelve months from the death of the deceased, may be sued for the amount of the duty and interest, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only.

(2) Every sum of money retained by an executor or trustee or paid into his hands for the duty on any property shall be paid by him forthwith to the Attorney-General or as the latter directs.

(3) Such executor and trustee shall for the purpose of the collection and payment of any duty which under the provisions of this Act it is his duty to collect and pay over to the Attorney-General be deemed to be a revenue officer for the collection thereof within the meaning of The Treasury Department Act.

**§3.—**(3) Unless the consent in writing of the Attorney-General is obtained, no person, whether or not acting in any fiduciary capacity, shall deliver, transfer, assign or pay or permit any delivery, transfer, assignment or payment of any chattel mortgages, book debts, promissory notes, moneys, shares of stock, bonds or other securities whatsoever, whether registered or unregistered, belonging to a deceased person, or in which such deceased person had any beneficial interest whatsoever, and which may be liable to duty in Saskatchewan, whether such deceased person died domiciled in Saskatchewan or elsewhere, or with respect to the succession to which duty is or may be payable in Saskatchewan; provided that nothing contained in this subsection shall apply to any person when acting solely in the capacity of executor.

(4) Unless the consent in writing of the Attorney-General is obtained, no person acting in the capacity of executor shall deliver, transfer, assign or pay or permit any delivery, transfer, assignment or payment of any book debts, notes, receivables, moneys, cash in bank, shares of stock, bonds, chattel mortgages or other securities whatsoever, when such property, or any of such property, is held by him in trust for a beneficiary who has died, whether domiciled in Saskatchewan or elsewhere, or in trust for the ultimate benefit of such deceased beneficiary on realization, or when such deceased beneficiary had any beneficial interest whatsoever in such property, or any of such property, and when such property, or any of such property, may be liable to duty in Saskatchewan, or with respect to the succession to which duty is or may be payable in Saskatchewan.

(6) Any bank, trust company, insurance company or other corporation, or any person mentioned in this section, failing to comply therewith shall incur a penalty not exceeding the amount of duty payable to the province in respect of any property dealt with in contravention of this section, or in respect of the succession to such property, and shall, in addition, be guilty of an offence and liable on summary conviction to a further penalty not exceeding \$1,000.

**76.—**(1) The duty imposed by this Act shall be payable out of the share of each person or beneficiary entitled to share in the property of the deceased according to the rate applicable to such person or beneficiary.

(2) Notwithstanding the foregoing provision any duty payable on the property passing to any person or beneficiary or in respect of the succession to property shall be recoverable as a debt due to the Crown within the meaning of section 70 by action in or on summary application to any court of competent jurisdiction against the executor in his representative capacity or the beneficiaries, or against the executor in such capacity and the beneficiaries, and any judgment rendered against the executor in his representative capacity or the beneficiaries, or against the executor in such capacity and the beneficiaries, shall be executed against the property passing on the death of the deceased or against the property or surplus in the hands of the executor or beneficiaries.

**80.—**(1) No letters probate or of administration or other grant with respect to the estate of a deceased person or with respect to any part thereof, shall issue in this province without the consent of the Attorney-General or some person deputed to act for him.

(2) In cases where a period of twelve months has elapsed since the date of the death, the Attorney-General shall not be under any obligation to give consent to the issue of letters probate or letters of administration or other grant, or the resealing of any grant of letters probate or letters of administration or other similar grant, except on such terms and conditions as he may think fit to impose and unless the applicant or applicants, where duty is payable, have first obtained an extension of time for payment under the provisions of subsection (1) of section 42. R.S.S. 1930, ch. 37, sec. 72.

The provisions above quoted show that the tax imposed by the Saskatchewan Act is direct in character. By section 76 it is provided that the duty is payable out of the share of

each beneficiary entitled to share in the property of the deceased, and if suit is instituted and judgment obtained, either as against the executor or the beneficiaries, it can only be executed against the property passing on the death of the deceased or against the property or surplus in the hands of the executor or beneficiaries. The executor can only be sued in his representative capacity, and he is in no sense personally liable. A judgment obtained against a beneficiary can only be executed against his personal property in circumstances where estate property has been received and disposed of by him. While section 25 provides for the furnishing of a bond by the applicant for letters probate or letters of administration, the bond is to be conditioned for the due accounting for the duty in the limited sense provided for by the Act, that is to say, the collection by the executor from the beneficiaries of the duty imposed or the deduction of same from the property or money in the hands of the executor. There are provisions enabling the Attorney-General to accept cash or bonds of the Province of Saskatchewan by way of alternative security, but these provisions do not make the executor personally liable for the duty as he is not imperatively required to furnish such security. The form of bond prescribed by the regulations under the Act provides that the obligation thereunder shall be void and of no effect if the executor collects the duty from the persons liable therefor and causes the amount collected to be paid to the Provincial Treasurer. The bond is accordingly not a personal bond for payment of the duty, but merely guarantees that the executor shall carry out the limited functions imposed upon him by the Act.

### Taxation Within the Province.

By section 4 of the Act it is provided, *inter alia*, as follows:

4.—(1) Where the deceased was at the time of his death domiciled elsewhere than in Saskatchewan, all property situate in Saskatchewan and any interest therein or income therefrom passing on the death of the deceased shall be subject to duty at the rates hereinafter imposed.



(2) Where the deceased was at the time of his death domiciled in Saskatchewan, a duty shall be imposed at the rates hereinafter set forth in respect of the succession to real property in the province and the succession to moveable or personal property wheresoever situate, by way of condition upon or as an incident of the accession to the benefits of the succession, and a duty shall also be imposed at the rates hereinafter set forth upon all property situate in Saskatchewan and any interest therein or income therefrom passing on the death of the deceased, where such property is not included in the property, the subject matter of the succession.

The incidence of the duties is set forth in sections 9 and 10 of the Act which provide, *inter alia*, as follows:

9.—(1) Subject to the exceptions mentioned in sections 7 and 8, there shall be levied and paid for the purpose of raising a revenue for provincial purposes the duties set forth in the following sections upon or in respect of the following, that is to say:

- (a) in respect of the succession to all real property in the province, and in respect of the succession to all moveable or personal property wheresoever situate, by way of condition upon or as an incident of the accession to the benefits of the succession, where the deceased was at the time of his death domiciled in the province; and
- (b) on property passing on the death and situate in the province, where the deceased was at the time of his death domiciled outside of the province.
- (c) on property passing on the death and situate in the province, where the deceased was at the time of his death domiciled in the province, and where the property is not included in the property the subject matter of the succession.

10. Where the aggregate value of the property exceeds \$15,000, duties shall be levied and paid:

- (a) on property passing or on so much thereof as passes in manner hereinbefore mentioned, either in whole or in part, to or for the benefit of the father, mother, husband, wife, child, son-in-law or daughter-in-law of the deceased, where the property is situate in the province and where the deceased was at the time of his death domiciled outside of the province;

- (b) in respect of the succession to real property in the province and the succession to moveable and personal property wheresoever situate, by way of condition upon or as an incident of the accession to the benefits of the succession, where the deceased was domiciled in the province at the time of his death, to the extent to which the property passes in manner hereinbefore mentioned to or for the benefit of the father, mother, husband, wife, child, non-in-law or daughter-in-law of the deceased;
  - (c) on property passing or on so much thereof as passes in manner hereinbefore mentioned, either in whole or in part, to or for the benefit of the father, mother, husband, wife, child, son-in-law or daughter-in-law of the deceased, where the property is situate in the province and is not included in the property the subject matter of the succession, and where the deceased was at the time of his death domiciled in the province;
- and such duties shall be levied and paid at the rate and on the scale as follows:

*Where the aggregate value:*

These provisions indicate that the tax in Saskatchewan is imposed upon:

- (a) Property situate in Saskatchewan and passing or deemed to pass on the death of any person, whether such person was domiciled in the province or elsewhere at the time of death; and
- (b) In respect to the succession to real property in the province and the succession to all movable and personal property wheresoever situated upon the death of a person dying domiciled in the province.

The taxation of property situate in the province obviously constitutes taxation within the province, and the validity of the first class of taxation cannot therefore be questioned.

Divergent views exist with respect to the validity of the taxation in respect to the succession to all the movable and personal property of a domiciled decedent. This particular

method of taxation has been discussed in Chapter II, and it only remains to observe that if the views expressed by the Chief Justice of Canada in the *Cotton* case are upheld by the Judicial Committee, then any doubts which may at present exist with respect to the validity of the Saskatchewan tax will have been removed.

With a view to emphasizing that the tax is upon the right or privilege of succeeding to property, as distinguished from a tax upon the property itself, and that the Act, in effect, constitutes part of the law of distribution, it is provided by subsections 5, 6 and 7 of section 3 as follows:

(5) The persons mentioned in The Intestate Succession Act as entitled to benefit upon the death of an intestate shall not have an absolute and unqualified right to so benefit, but such right shall be subject to the condition or qualification that the Crown in the right of the province shall have priority in the distribution of the estate of the intestate and shall first be paid the succession duty imposed with respect to such intestate succession.

(6) The persons mentioned in the last will and testament of a deceased person who dies domiciled in the province shall not have an absolute and unqualified right to the benefits provided by such last will and testament, but such right shall be subject to the condition or qualification that the Crown in the right of the province shall have priority in the distribution of the estate of the deceased and shall first be paid the succession duty imposed with respect to such testate succession.

(7) The conditions or qualifications referred to in subsections (5) and (6), shall be deemed to form part and always to have formed part of the law of distribution of the province in respect of the estates of deceased persons dying domiciled in the province, and the Crown in the right of the province shall be deemed to be entitled to the succession duty imposed with respect to the succession to such estates as if it had been directly provided either by The Intestate Succession Act or by the last will and testament of the deceased that the amount of such succession duty, when ascertained, shall be payable to the Crown in the right of the province as its share of the estate of the deceased in distribution, and that the shares of the beneficiaries shall be reduced accordingly.

### Strict Construction.

As pointed out in the *Sudeley* case, *supra*, the legatee of a share in residue has no interest in any of the property of the testator until such residue has been determined. This being so, it is not possible to determine the actual benefit receivable by a residuary beneficiary until the time of distribution, and a tax upon property passing to or for his benefit, if the benefit is actual and not only a theoretical character, cannot be ascertained until that time has arrived. Certain of the provincial enactments are framed on the assumption that it is possible to determine the actual benefit passing as at the time of death. The validity of these enactments may be open to question so far as residuary bequests are concerned having regard to the judgment delivered by Robson, J.A., in *Re Bennett: Provincial Treasurer v. Bennett* (1936), 2 D.L.R. 291. With a view to overcoming the difficulty referred to in this judgment, it is provided by subsections 4, 5 and 6 of section 76 of the Saskatchewan Act as follows:

(4) Notwithstanding that the benefit to which each beneficiary is entitled under the will of a deceased person or upon his intestacy cannot be definitely ascertained until the time of distribution, nevertheless for the purposes of this Act, and particularly for the purpose of determining the rate and amount of duty payable by each beneficiary, and the property out of which it is payable, such benefit shall be deemed to be ascertained or to be ascertainable as at the time of the death of the deceased in the following manner, that is to say:

- (a) where property is specifically devised or bequeathed, the benefit shall be deemed to be equivalent to the value of that property as at the time of the death of the deceased after deducting therefrom such portion of the allowances mentioned in section 6 as are legally payable thereout;
- (b) where by his will the deceased has made provision for bequests other than specific bequests or residuary benefits, such bequests shall be regarded as payable proportionately out of the property legally applicable to the satisfaction thereof, and such property shall be deemed

to be of a value upon distribution equivalent to the value thereof as at the time of the death of the deceased after deducting therefrom such portion of the allowances mentioned in section 6 as are legally payable thereout, and each beneficiary shall be deemed to benefit as if the value or amount thus ascertained were distributed accordingly;

- (c) where by his will the deceased has made provision that, after payment of specific and other bequests and debts, his residuary estate shall devolve upon certain beneficiaries, the value of such residuary estate shall be deemed to be equivalent to the value or amount which would be arrived at if the whole property of the deceased were available for distribution at or immediately after his death on the basis of the values then existing after deducting specific and other bequests mentioned in the will and such portion of the allowances mentioned in section 6 as are legally payable thereout, and each residuary beneficiary shall be deemed to benefit as if the value or amount thus ascertained were distributed accordingly;

- (d) where a person dies intestate, the benefit passing to the persons entitled to share in the distribution of his estate under The Intestate Succession Act or any other statute of distribution shall be deemed to be equivalent to the value of the property, the subject matter of the succession, as at the time of the death of the deceased, after deducting therefrom such allowances mentioned in section 6 as are legally payable thereout.

- (5) Property passing on the death other than property devolving under the will of a deceased person or upon intestacy shall be valued as at the date of the death of the deceased, and each beneficiary in respect of such property shall be deemed to be entitled to a benefit equivalent to the value of that property or of his interest therein at that time.

- (6) Where in this Act the expression "property passing to or for the benefit of" appears, the word "benefit" shall be construed as having reference to the benefit deemed to be ascertained or to be ascertainable in accordance with the provisions of this section.

## **CHAPTER VIII.**

### **THE TAX IN QUEBEC.**

There are three varieties of death duties in force in the Province of Quebec, which may be briefly described as follows:

1. Duties upon property situate within the province, the ownership of which is transmitted owing to death;

2. Duties on the transmission within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province; and

3. Court fees payable by beneficiaries resident outside of Quebec, to whom there is transmitted, by the death of any person domiciled in the province, the ownership, usufruct or enjoyment of movable property locally situate outside the province.

#### **Constitutionality of the Tax.**

##### **Direct Taxation.**

The provisions of the Quebec Succession Duties' Act, so far as they concern the question as to whether or not the taxation imposed thereby can be regarded as direct, are as follows:

**3.—1.** All property, moveable or immoveable, the ownership, usufruct or enjoyment whereof is transmitted owing to death, in the direct line, ascending or descending; between consorts; between father- or mother-in-law and son- or daughter-in-law, or between stepfather or stepmother and stepson or stepdaughter,—shall be liable to the following duties calculated upon the aggregate value of the property transmitted;

**In estates the aggregate value of which**

**(a) Does not exceed, etc.**

**13.** Every heir, universal legatee, legatee by general or particular title, or donee under a gift in contemplation of death, or under a disposition such as mentioned in sections 6 and 6a, as well as every insurance beneficiary, shall be personally liable for the duties due in respect of his share in the succession, and for no more.

In the case of transfer of property with usufruct or substitution, the amount payable shall be calculated as if the usufructuary or the institute received as absolute owner and the duties shall be paid only on the actual capital of the property transmitted.

The usufructuary or institute shall, under penalty of the fine provided in subsection 9 of section 14, see that the said property be applied to such purpose and, if necessary, he may, with the authorization of a judge of the Superior Court upon the conditions which the judge may fix, alienate or pledge such property for the payment.

No notary, executor, trustee or administrator shall be personally liable for the duties imposed by this division. Nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or money in his possession belonging or owing to the beneficiaries, and, if he fail so to do, may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only.

**24.—1.** Every transmission within the province, owing to the death of a person domiciled therein, of moveable property locally situate outside the province at the time of such death, in the direct line, ascending or descending; between consorts; between father- or mother-in-law and son- or daughter-in-law, or between step-father or stepmother and stepson or stepdaughter,—shall be liable to the following duties calculated upon the aggregate value of the property transmitted:

In estates the aggregate value of which:

(a) Does not exceed, etc.

Section 32 contains a provision similar in terms to section 13, except that it relates to duties on the transmission within the province of movable property locally situate outside the province.

By subsection 7b of section 14, and subsection 6b of section 33, it is provided that no executor, trustee, administrator, curator, heir, legatee or donee shall consent to any transfer or payment of legacy until the duties have been paid and a certificate of payment has been delivered by the proper

official. It is further provided that any person violating this provision shall be liable to a fine equal to twice the amount of the duty, and, in default of payment, to imprisonment for not more than one month.

These provisions indicate that the taxation imposed by the Quebec Succession Duties Act is direct. The beneficiaries are the only persons made personally liable for payment of the duties. The executor, the trustee or the administrator may be required to pay the duties out of the property or money in his possession belonging or owing to the beneficiary or beneficiaries, but there is no personal liability upon him to make payment out of his own funds. He is not required to furnish security for payment, but if he fails to make provision for the duties out of the estate property he may be sued for the amount thereof, but only in his representative capacity. Although he becomes liable to a fine if he consents to any transfer or payment of legacies while the duties remain unpaid, this provision in no sense makes him personally responsible for payment of the duties.

The Quebec Act respecting the seizin of certain beneficiaries, being Chapter 30 of the Revised Statutes of 1925, provides that the lawful heir or legatee domiciled or resident ordinarily outside of the province, to whom there is transmitted, by the death of any person domiciled in the province, the ownership, usufruct or enjoyment of moveable property locally situate outside the province at the time of such death,—shall not be seized by law alone of the ownership, usufruct or enjoyment of the property transmitted to him by such death, or of the right to the thing bequeathed, whether the property or thing bequeathed be locally situate within or without the province, but he must have himself put into possession of the property or obtain legal delivery of the thing bequeathed in the manner provided for in the Act.

It is provided that the application for putting into possession, or for legal delivery, must be preceded by a declaration under oath setting forth certain particulars, and that



such declaration must be made by the heir, or by the legatee, or by any other person acting for him.

The putting into possession or the legal delivery may be had only after payment by the heir or legatee of a court fee calculated on the real value of the movable property locally situate outside of the province, at the rates mentioned in the Act.

Section 3 provides that no executor, trustee, administrator, curator or legatee may effect a transfer or the payment of the legacies, unless legal delivery has been previously obtained.

Section 3a provides that every executor, trustee, administrator, curator, heir or legatee, who violates the provisions of the Act shall be liable to a fine equal to twice the amount of the fee exigible under the Act.

It is considered that the court fee payable under the Act constitutes direct taxation. Personal liability for payment of the fee is confined to the heir or legatee. The executor or administrator becomes liable to a fine if he transfers or pays any legacies before legal delivery has been obtained in accordance with the statutory provisions, but he is in no way liable for payment of the prescribed court fee.

### **Taxation Within the Province.**

Subsection (1) of section 3, and subsection (1) of section 24 of the Quebec Succession Duties Act are quoted above in connection with the subject of direct taxation. In addition to these provisions, the following sections of the Act have a bearing upon the question as to whether the taxation imposed thereby constitutes taxation within the province, namely:—

**S.** The word "property" within the meaning of this division includes all property, moveable or immoveable, actually situate within the province, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the province, or are due by a debtor domiciled therein; the whole whether the deceased at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province.

The word "property" does not include, however, the sum of money due by an insurer by reason of the death of the insured, payable in this province, if the contract was not made therein and if the insured never had his domicile therein.

6. For the purposes of this division, the ownership, usufruct or enjoyment of any property shall be held to be transmitted owing to death, and the value of such property shall be liable to payment of duties, whenever there has been a disposition thereof, by gratuitous title, in any manner whatsoever, and when such disposition has taken effect less than five years before the death of the person who has made it, save in the case of any donation *inter vivos* to any one donee of moveable or immoveable property, when the total amount given does not exceed one thousand dollars.

6a.—1. For the purposes of this division, the ownership, usufruct or enjoyment of any property shall also be held to be transmitted owing to death whenever the disposition has taken effect more than five years before the death of the person who has made it and whenever such person has reserved to himself, in whole or in part, the control, administration, ownership or enjoyment of such property or part thereof, until his death or until a period after his death.

7. For the purposes of this division, a disposition which consists of leaving to one or more survivors of several joint proprietors a property, held in common or joint ownership before the death, is assimilated to a gift in contemplation of death, and the share of the deceased shall be subject to the payment of succession duties.

25. All debts owing to the deceased at the time of his death, or which are payable by reason of his death, and which at the time of such death were payable outside the province, are included in the moveable property taxable in virtue of this division.

27. For the purposes of this division, any transmission within the province, by a person domiciled therein, of moveable property locally situated outside the province, shall be held to be a transmission owing to the death of such person, and shall be liable to the payment of duties, whenever there has been a disposition thereof, by gratuitous title, in any manner whatsoever, and when such disposition has taken effect less than five years before the death of the person who has made it, save in the case of any donation *inter vivos* to any one donee of moveable property, when the total amount given does not exceed one thousand dollars.

27a.—1. For the purposes of this division, any transmission within the province, by a person domiciled therein, of moveable property locally situated outside the province, shall also be held to be a transmission owing to death of such person wherever the dis-

position has taken effect more than five years before the death of the person who has made it and whenever such person has reserved to himself, in whole or in part, the control, administration, ownership or enjoyment of such property, or part thereof, until his death or until a period after his death.

28. For the purposes of this division, a disposition which consists of leaving to one or more survivors of several joint proprietors a property held in common or joint ownership before the death, shall be assimilated to a gift in contemplation of death, and the share of the deceased shall be subject to the payment of succession duties.

### Taxation of Property.

Section 3 provides for the taxation of property, the ownership, usufruct, or enjoyment whereof is transmitted owing to death. By section 5 the word "property" is defined as including all property, movable or immovable, actually situate within the province, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the province, or are due by a debtor domiciled therein. It will be observed that this definition, in so far as it relates to debts owing to the deceased, has the effect of subjecting to taxation all debts which are payable in the province, or are due by a debtor domiciled therein. The rule laid down in *Hope's* case with regard to the situation of specialty debts is that such debts are situate where the specialties are found at the time of the owner's death. It is considered that the taxation of debts in the wide sense provided for in the Quebec legislation is *ultra vires* in so far as it relates to or concerns specialty contracts found outside the province, even although the debts payable thereunder are payable in the province, or are due by a debtor domiciled therein. See *Smith v. Provincial Treasurer of Nova Scotia*, 47 D.L.R. 108; 58 S.C.R. 570; *The King v. National Trust Company*, (1933), Can. S.C.R. 670; (1933), 4 D.L.R. 465.

Section 24 provides for the taxation of every transmission within the province, owing to the death of a person domiciled therein, of movable property situate outside the province at the time of the death. It has been held in

*Alleyn-Sharp v. Barthe, supra*, that this provision constitutes taxation within the province within the meaning of the British North America Act.

Sections 6, 6a, and 7 make provision for the taxation of certain dispositions of property *inter vivos*, and property held in joint ownership. Having regard to the definition of the word "property" as contained in section 5, the taxation imposed by these provisions is *intra vires* of the Legislature except in relation to specialty contracts found outside the province.

Sections 27, 27a, and 28 impose taxation upon certain dispositions *inter vivos* of movable property locally situate outside the province made by a person domiciled in the province during his lifetime. The validity of these provisions may be open to question if they are intended to cover all dispositions of the classes mentioned of the outside movable or personal property. There is no principle generally recognized under which transactions *inter vivos* respecting particular movable objects are held to be governed by the *lex domicilii*. In these circumstances, the situs of a disposition or gift *inter vivos* of movable or personal property would largely depend upon the situs of the property itself.

The question as to whether or not the taxation imposed by the Beneficiaries Seizin Act constitutes taxation within the province is governed by similar considerations as those which are applicable to the tax imposed in Saskatchewan in respect of the succession to all the movable or personal property of a domiciled decedent. In effect, the court fee charged by the Quebec legislation is a tax imposed upon the beneficiaries in the estates of domiciled decedents as a condition upon or as an incident of the accession to the benefits of the succession in relation to the outside personal property. Whether or not a tax of this kind is valid depends upon the accuracy or otherwise of the views expressed by the present Chief Justice of Canada in the *Cotton* case. The question has not yet been dealt with by the Judicial Committee.

**Strict. Construction.**

The Quebec Succession Duties Act differs from the Acts in force in the other provinces in that there is no provision therein definitely stating that, in determining the aggregate and dutiable values, these values shall be taken as at the time of death. By subsection 4 of section 3 it is provided that the expression "aggregate value" shall mean the real value of the property after deducting therefrom the debts and charges existing at the time of the death and allowed. A similar definition is contained in subsection 4 of section 24 in relation to the taxation of transmissions within the province. It would appear, however, that although the Act does not state so in definite terms, the intention underlying the statutory provisions is that the "aggregate value" shall be determined as at the time of the death, or within a reasonable period thereafter. By section 14 the executor and the beneficiaries are required to file declarations disclosing such particulars as are necessary to enable the duty to be calculated, including the real value of the property transmitted by the deceased, and these declarations must be filed within three months after the date of death. Provision is made for extending the time for filing the declarations, but the Act contemplates that such extensions shall not exceed eight months in all, so that the Legislature must have intended that values should be determined within a year after the death. This being so, the officials administering the statutory provisions may experience the same difficulties as those which have already been considered in relation to the Ontario Act. These difficulties are briefly as follows:—

- (a) In certain cases of testamentary disposition, it may not be possible for the Crown to show that any particular item of estate property passes to or for the benefit of any particular beneficiary or class of beneficiaries; and
- (b) The difficulty of establishing what is a transmission within the province of the outside personal property of a domiciled decedent in relation to testamentary benefits other than those of a specific or universal character.

## **CHAPTER IX.**

### **THE PROPERTY UPON OR WITH RESPECT TO WHICH SUCCESSION DUTY IS PAYABLE.**

As a general rule, the provincial statutes relating to succession duty have been framed with a view to reaching all classes of property which pass on the death or are deemed to pass on the death of deceased persons, and which are situate in the taxing province. In some of the provinces the succession to the outside property of domiciled decedents, and the transmission of such property to persons domiciled in the province, have also been made the subject of taxation.

The word "property" has not been given a uniform definition. In the Province of Quebec it is defined as including all property, movable or immovable, actually situate within the province, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the province, or are due by a debtor domiciled therein; the whole whether the deceased at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province.

In Ontario "property" is defined as including money and real and personal property of every description and income therefrom and every estate and interest in such property and income.

The statutes of Nova Scotia and Prince Edward Island define "property" as including real property and personal property of every description, and every estate and interest therein and any income therefrom and the proceeds of sale thereof, respectively, and any money or investment for the time being representing the proceeds of sale.

In the other provinces the expression is defined as including real and personal property of every description and

every estate or interest therein capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives.

The statutes cover all the real and personal properties owned by deceased persons at the time of death, but their operation is not confined to such properties. There are other properties brought within the scope of taxation by the provisions that they shall be "deemed to pass" for succession duty purposes.

The expression "passing on the death" is defined in all the statutes, with the exception of that in force in the Province of Quebec, as meaning passing either immediately on the death or after an interval, either certainly or contingently, and either originally or by way of substitutive limitation, whether the deceased was at the time of his death domiciled in the province or elsewhere. This definition is taken from section 22(1) of the English Finance Act, 1894 (57 & 58 Vict., ch. 30).

A judicial construction of the word "passes" was given in *Re Cowley's Estate* (1898), 1 Q.B. 355, at p. 374, by Rigby, L.J., who said:

"The very general word 'passes' is not a technical word, but one capable of the widest possible meaning, and there is nothing in the general scheme to limit its meaning to the property of the deceased. Indeed in connection with the words 'settled or not settled' it seems to involve plainly property which did not belong to the deceased, and may never have belonged to him."

In general "passes" may be taken as meaning "changes hands". *Neville v. Inland Revenue Commissioners* (1924), A.C. 385, per Lord Haldane at p. 389.

An example of property passing "immediately" on the death is found in the case of a limitation to the deceased for life, and, on his death, to other persons.

For illustrations of property passing on the death "after an interval", see *Attorney-General v. Gell* (1865) 3 H. & C.

615; 34 L.J. Ex. 145; 12 L.T. 461; 29 J.P. 566; and *Ring v. Jarman* (1872), L.R. 14 Eq. 357, 41 L.J. Ch. 535; 26 L.T. 690; 20 W.R. 744.

Property passing or deemed to pass on death for purposes of succession duty may be considered under the following headings, namely:—

- (a) The deceased's free estate locally situate within the province;
- (b) Property situate out of the province;
- (c) Property of which the deceased was competent to dispose;
- (d) *Donationes mortis causa*, or death-bed gifts;
- (e) Gifts *inter vivos*.
- (f) Property owned jointly, or purchased or invested in joint names;
- (g) Policies of insurance;
- (h) Annuities or other interests purchased or provided by the deceased;
- (i) Property comprised in a settlement;
- (j) Property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by his death; and
- (k) Estates in dower or by the curtesy.

**(a) Deceased's Free Estate.**

The free estate of a deceased person consists of the ordinary forms of real and personal property owned by him in his lifetime, and which pass under his will or upon intestacy.

Succession duty is payable in Quebec on the deceased's free estate actually situate within the province, the ownership, usufruct, or enjoyment whereof is transmitted owing to his death.

In the other provinces duty is payable on the deceased's free estate locally situate within the province where such



estate passes or is transmitted on the death to or for the benefit of certain specified classes of beneficiaries. In other words, the property taxable under this heading includes:—

- (a) Property devised or bequeathed by will; and
- (b) Property passing on the death of the owner to his heirs or personal representatives.

The statutes of Quebec, Nova Scotia and Prince Edward Island provide that debts and choses in action due and owing from persons in the province to any deceased person at the time of his death shall be property of the deceased situate in the province for purposes of taxation. This provision is probably *ultra vires* so far as it relates to specialty debts, where the specialty is found outside the province at the time of death. *The King v. National Trust Company* (1933), Can. S.C.R. 670; (1933), 4 D.L.R. 465.

### Locality of Assets.

In the case of a deceased person domiciled outside the taxing province at the time of his death, the situation of the property passing on his death determines the liability of the property to succession duty, and in consequence it becomes necessary to consider the principles applicable in ascertaining the situs of particular classes of property.

### Immovable Property.

The immovable property of a deceased person situate outside of the province is not liable to succession duty, irrespective of where the deceased was domiciled in his lifetime. The distinction between movable and immovable property largely corresponds with that which exists between personal and real property, except that leaseholds, though immovable, are nevertheless personal property. Whether property is movable or immovable is a question which must be decided by the *lex situs*—the law of the place where the property is situate. *Re Hoyles, Row v. Jagg* (1911), 1 Ch. 179, 186, C.A. Land subject to a trust in a will for conversion although personal property for some purposes is

not a movable for succession duty purposes. *Alexander v. Attorney-General of British Columbia* (1927), 1 D.L.R. 602; 38 B.C.R. 28; *In re Berchtold, Berchtold v. Capron* (1923) 1 Ch. 192; 92 L.J. Ch. 185; 128 L.T. 591.

### Simple Contract Debts.

A simple contract debt is considered to be situate in the country where the debtor resides and where proceedings to enforce payment can be taken. The origin of the rule, and the ground upon which it rests, are stated by Lord Field in *Commissioner of Stamps v. Hope* (1891), A.C. 476; 60 L.J. P.C. 44; 65 L.T. 268; in the following passage:—

"Now a debt *per se* although a chattel and part of the personal estate which the probate confers authority to administer has, of course, no absolute local existence, but it has long been established in the courts of this country, and is a well settled rule governing all questions as to which court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be *bona notabilia* within the area of the local jurisdiction within which he resides; but this residence is of course of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specialty had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was *bona notabilia* where it was 'conspicuous', i.e., within the jurisdiction within which the specialty was found at the time of death."

The rule that the residence of the debtor governs the situs of a simple contract debt is applicable even although

the documentary evidence of the debt may be in another country. In *Sutherland v. Administrator of German Property* (1934), 1 K.B. 423, C.A., cargo shipped on a British-owned vessel in America for carriage to Europe was insured by the American branch of a German insurance company in 1912. Both ship and cargo were lost and the insurance company paid the assured for a total loss. In 1918 actions were brought in England against the shipowners and were compromised for a sum of which £4,538, being the share due to the insurance company, was paid to the Administrator of German Property. The bills of lading, together with other documents necessary to prove the claim, being in the custody of the Alien Property Custodian of the United States, he claimed to be entitled to the money, on the ground that it had become vested in him. It was held that the fact that the bills of lading and other documents relating to the claim against the ship-owners were in the hands of the plaintiff did not entitle him to say that the situs of the chose in action was in the United States of America. The situs of the chose in action was in England, where the persons against whom the claim was made resided. Accordingly the Custodian's claim failed.

The rule as to the situs of a simple contract debt was applied in *re Muir Estate; Standard Trust Company v. Treasurer of Manitoba* (1915), 8 W.W.R. 1226; 51 S.C.R. 428; 23 D.L.R. 811; affirming 6 W.W.R. 995; 28 W.L.R. 358; 18 D.L.R. 144; 24 Man. R. 310. Part of the assets of Robert Muir, deceased, late of Winnipeg, Manitoba, consisted of a simple contract debt owing from one A. E. Little of Morden, Manitoba, amounting to \$13,400.00. The Supreme Court of Canada held that this debt was subject to succession duty in the Province of Manitoba.

There is an exception to the rule in *Hope's case* as to the situation of simple contract debts, in the case of negotiable instruments, such as promissory notes and bills of exchange. Where such instruments, forming part of the property of a deceased person, are reduced into possession by a foreign administrator within the territory from which he

receives his grant, and where they are actually found in such territory at the time of the death, then not only the securities themselves, but also the debts or money due thereupon, are to be held situate in that territory, notwithstanding that the debtors are resident elsewhere. *Attorney-General v. Bouwens* (1838), 4 M. & W. 171; 7 L.J. Ex. 297; 150 E.R. 1390; *Winans v. Attorney-General* (1910), A.C. 27; 79 L.J.K.B. 156; 101 L.T. 754; 26 T.L.R. 133; *Crosby v. Prescott* (1923), S.C.R. 446; affirming 32 Man. R. 108; 68 D.L.R. 250; *Re Bennett, Provincial Treasurer v. Bennett* (1936) 2 D.L.R. 291.

In *Crosby v. Prescott*, the facts were that Marie Louise Crosby, domiciled in Massachusetts, died there leaving among the assets of her estate promissory notes payable to her order but not indorsed. The maker lived in Manitoba. The Probate Court of Massachusetts appointed Charles O. Prescott administrator of the deceased's estate. It was held by the Supreme Court of Canada, affirming the judgment of the Manitoba Court of Appeal, that the situs of the notes was in Massachusetts, they being transferable by acts done solely there, and the administrator or his transferee alone could sue on them. It was also held that the administrator could maintain an action against the maker in the Manitoba courts without taking out ancillary administration in that province.

In *re Bennett, Provincial Treasurer v. Bennett*, an appeal was taken by foreign executors from the judgment of Montague, J., allowing the claim of the Province of Manitoba for succession duty in respect of a bank deposit receipt given by the Royal Bank of Canada, Winnipeg, for the sum of \$50,000.00. On August 14, 1934, Russell M. Bennett, a resident of Minnesota, deposited \$50,000.00 with the Winnipeg branch of the Royal Bank of Canada, when he was given a deposit receipt, stated on its face to be negotiable. Mr. Bennett died at Minneapolis on October 31, 1934. Among his effects and in his possession at his death was this deposit receipt. He died domiciled in the State of Minnesota. The Province of Manitoba claimed succession

duty in respect of the deposit and interest. In an affidavit by the executors it was stated that the deposit receipt had been reduced by them into their possession in the State of Minnesota.

The claim of the province was disallowed by the Court of Appeal, the Court holding that the deposit receipt, being negotiable on its face, was a specialty debt, not one of simple contract, having its situs in the State of Minnesota where it was found on the owner's death.

Upon a further appeal to the Supreme Court of Canada, the judgment of the Manitoba Court of Appeal was affirmed.

### Specialty Debts and Crown Debts.

A specialty debt, that is to say, a debt secured by an instrument under seal, is considered to be situate in the country where the deed is at the death of the deceased. *Commissioner of Stamps v. Hope* (1891), A.C. 476; 60 L.J.P.C. 44; 65 L.T. 268; *Attorney-General v. Bouwens* (1838), 4 M. & W. 171, 191.

The question as to whether or not a debt is a specialty is decided by the law of the testator's domicile, and not by the *lex loci*.

*Payne v. The King* (1902), A.C. 552; 71 L.J.P.C. 128; 87 L.T. 84. The facts in this case were that a testator who resided and was domiciled in Victoria, Australia, had a mortgage on property in New South Wales, the mortgagor being resident and domiciled in Victoria. Probate duty had been paid in Victoria on such mortgage debt. The appellant claimed a return of the duty. The Judicial Committee decided against the claim and gave judgment that duty was correctly paid in Victoria. Lord Macnaghten, when delivering judgment, said: "The debt, though a specialty debt in New South Wales, was a simple contract debt in Victoria. . . . The debt was an asset in Victoria and recoverable under a Victorian probate, although it may well be that in order to discharge the mortgage probate duty would also

have to be paid in New South Wales, and the debt, if recovered in Victoria, might be retained in Court until the mortgagees were in a position to discharge the mortgage."

The rule as to situs of specialties applies to a policy of insurance under seal. *Gurney v. Rawlins* (1836), 2 M. & W. 87. It also applies to a mortgage under seal, except where the mortgage has been executed in duplicate and the duplicate instruments are in different places. *Commissioner of Stamps v. Hope*, *supra*; *Toronto General Trusts Corporation v. The King* (1919), A.C. 679; 88 L.J.P.C. 115; (1919), 2 W.W.R. 354; affirming 53 S.C.R. 26; (1917), 3 W.W.R. 633; and (1917), 1 W.W.R. 823; 11 A.L.R. 138.

Debts owing by the Crown, or by virtue of a statute, are specialties, and are subject to taxation in the province where found at the time of death.

In *Royal Trust Company v. Attorney-General of Alberta* (1930), 1 D.L.R. 868; affirming (1929), 1 D.L.R. 923; 24 A.L.R. 357; it was held that bonds not under seal but issued by the Dominion of Canada pursuant to proper statutory authority and authenticated in the manner prescribed thereby were specialties, being debts due from the Crown and debts arising by statute, and therefore "locally situate" for succession duty purposes in the country in which they physically were at the death of the owner thereof.

The same principle receives further illustration in the decision of the Supreme Court of Canada in *The King v. National Trust Company* (1933), 4 D.L.R. 465; S.C.R. 670; affirming (1933), 2 D.L.R. 474; 54 Que. K.B. 351. The Crown, in the right of the Province of Quebec, claimed the sum of \$14,775.95, as representing succession duties alleged to be due by respondent, as sole trustee and executor of the estate of Sir Clifford Sifton, deceased, who died in New York in 1929 and was at the time of his death domiciled in the Province of Ontario. Amongst the assets of his estate were certain bonds or debentures of the Grand Trunk Pacific Railway Company and the Canadian National Railway Company respectively, guaranteed by the Government of

Canada. These bonds or debentures, registered in Montreal, were at the time of the death of the deceased in his possession in Toronto. Succession duties were paid to the Government of the Province of Ontario; but the Province of Quebec also claimed succession duties on the ground that these bonds or debentures were to be considered as property situate in the Province of Quebec according to the definition of the word "property" in section 5 of the Succession Duties Act, because the two companies had their head offices in Montreal, and the bonds and debentures were registered and transferable on the registers of the companies in that city.

It was held (1) that the Grand Trunk debentures were, as respects both the obligation of the company and the guarantee of the Government, specialties having their situs in Ontario at the critical time; (2) that the Canadian National debentures were as regards the guarantee of the Government specialties having their situs in Ontario where they were found in the deceased's possession, but as regards the obligation of the company they were not specialty or statutory debts but merely simple contract debts and considering that, in view of the relevant contractual and statutory provisions, it was unnecessary to resort to the Province of Quebec for the purpose of transfer or collection, while for the purpose of asserting the holder's primary rights in case of default resort to the trustees in New York was necessary and for the purpose of getting possession of the debentures probate or administration in Ontario was necessary, situs of the asset could not be held to be in Quebec.

### **Mortgages.**

Mortgage debts are governed by the same rules as other debts. If the mortgage is a specialty, the general rule is that the debt is situate where the instrument is found. *Commissioner of Stamps v. Hope, supra*; *Treasurer of Ontario v. Pattin*, 22 O.L.R. 184. In the latter case, the estate of John H. Pattin, who, at the time of his death, was domiciled in the Province of Ontario, was held (Garrow, J.A., dis-

senting, and Maclaren, J.A., doubting), liable to succession duty in respect of a large number of mortgages upon real estate situate in the State of Michigan, made in favour of the deceased, and executed by mortgagors who were, at the respective dates of the instruments and the mortgagee's death resident in Michigan. At the time of the death of the deceased, the mortgages were in his custody at Windsor, Ontario, and the Court ruled that the instruments were *bona notabilia* in Ontario, following the artificial rule of law adopted in *Hope's* case.

The ordinary rule as to situs of specialties is not applicable in the case of mortgages under seal, which are executed in duplicate, where one copy is filed in a registry, and the other is found elsewhere. In such cases, the debt is situate where the registry office is located.

*Rex v. Toronto General Trusts Corporation*, 88 L.J.P.C. 115; 46 D.L.R. 318; (1919), 2 W.W.R. 354; (1919), A.C. 679; affirming 39 D.L.R. 380; 53 S.C.R. 26; (1917), 3 W.W.R. 633; and 32 D.L.R. 524; (1917), 1 W.W.R. 823; 11 Alta. L.R. 138. Here the estate of Richard Grigg, who, at the time of his death, was domiciled in the Province of Ontario, included certain mortgages secured upon lands in the Province of Alberta. A duplicate of each of the mortgages was in the possession of the deceased at his place of business in Ottawa, Ontario. The other duplicate was registered in the proper Land Titles Office in the Province of Alberta.

The Privy Council held that the Province of Alberta was entitled to succession duty on these mortgages. Viscount Cave, in delivering the judgment of the Court, said:

"The administrator contended that the mortgages in question were, at the date of testator's death, situate, not in Alberta, but in Ontario, and supported his contention by reference to the rule of law which provides that whereas a simple contract debt is to be deemed to be within the area of the local jurisdiction within which the debtor for the time being resides, the locality of a specialty debt is the place where the specialty is found at the time of the creditor's death (*Wentworth* on the office of Executor, ed. 1720,



p. 46; Bacon's Abridgment, tit. 'Executors and Administrators' (E) p. 462; *Gurney v. Rawlins*, 2 M. & W. 87, 6 L.J. Ex. 7; *Commissioners of Stamps v. Hope* (1891), A.C. 476; L.J.P.C. 44). This rule has been recognized in numerous decisions both here and in the Dominion of Canada, and the general principle must be regarded as well settled. But in the present case there is a difficulty in applying the rule, owing to the fact that each of the mortgages was created and evidenced by duplicate deeds and that at the date of the testator's death one of such deeds was in the Province of Ontario, and the other in the Province of Alberta. In these circumstances, any argument which goes to show that, under the rule which fixes the locality of a specialty debt in the place where the specialty is found, the debts in this case were situate in Ontario at the testator's death, is equally effective to prove that they were situate in Alberta; and yet it is plainly impossible to hold that they were situate in both provinces at once. A similar difficulty in applying the rule may arise in any case where an obligation is created or evidenced by two or more deeds of collateral value which are found in different jurisdictions; and the truth appears to be that in such cases the rule gives no guidance on the question of the locality of the debts, and regard must be had to the other circumstances of the case. In the present case, the circumstances, other than the single fact of the presence of a duplicate deed in the Province of Ontario, are all in favour of the conclusion that the mortgages were situate in Alberta. It is established by formal admissions made in the course of the proceedings that at the date of the execution of the mortgages, the mortgagors were resident in the Province of Alberta, and that the place of payment of the debt was in each case in the Province of Alberta. The debts were secured, not only by the personal obligation of the mortgagors, but also by mortgages which created interests in land in Alberta, and this fact cannot be put out of account. See *Walsh v. Reg.* (1894), A.C. 144, at p. 148, 68 L.J.P.C. 52). The mortgages are executed in a form prescribed by the Land Titles Act of Alberta, and

derive their force and effect from the terms of that statute, and this is not less the case because a seal has been voluntarily affixed to each mortgage. The administrator cannot enforce any of his securities without procuring registration of his succession in the Alberta registry and relying on documents registered in that province; and although the debtors may be prepared to pay the debts secured without putting the administrator to the trouble of suing or realizing his securities, it is plain that they would not do so except on the terms of the mortgaged lands being released in accordance with Alberta law. In short, the administrator cannot recover the debts or have the benefit of his securities without claiming the protection and assistance of the Alberta law; and the case falls within the test laid down by Lord Cranworth in *Wallace v. Attorney-General*, L.R. 1, Ch. 1, 11 Jur. (N.S.), 937, as to the limitation on the imposition of succession duty, namely, that such a duty must be considered to be imposed only on those who claim title by virtue of the law of the taxing state. When all these circumstances are taken into account, the only possible conclusion appears to be that the mortgages in question in this case were situate in Alberta. This conclusion is in accordance with the decisions of the Board in the cases of *Walsh v. Reg.*, *supra*; *Henty v. Reg.* (1895), A.C. 557; 65 L.J.P.C. 94; and *Payne v. Reg.* (1902), A.C. 552; 71 L.J.P.C. 128; and is not inconsistent with the judgment in *Commissioners of Stamps v. Hope*. It is indeed suggested that as the mortgage referred to in the last mentioned case was registered in New South Wales, it must be assumed that it was executed in duplicate. But no reference to such an execution in duplicate is found either in the record of the case, in the arguments of the counsel, or in the judgment of the Board."

If a mortgage has not been executed under seal, the residence of the mortgagor, and not the situation of the mortgaged property, determines the situation of the simple contract debt secured thereby. *Payne v. The King* (1902), A.C. 552; 71 L.J.P.C. 128; 87 L.T. 84; *Lawson v. Commissioners of Inland Revenue* (1896), 2 Ir. R. 418; W.N. 145;

*Royal Trust Company v. Provincial Secretary-Treasurer of New Brunswick* (1925), S.C.R. 94; 2 D.L.R. 49; reversing 52 N.B.R. 21. In the last mentioned case the facts were as follows: The deceased, Anna M. Ferguson, who, at her death, was domiciled in Chicago, left as part of her estate mortgages on real estate in New Brunswick. The instruments embodying the mortgage debts and the securities were in the usual New Brunswick form. All these instruments were in Chicago at the death of the mortgagee. A special case was submitted by the Royal Trust Company as administrator *cum testamento annexo* regarding the question whether or not the estate should pay succession duties in the Province of New Brunswick on the mortgage property. The Appeal Division of the Supreme Court of New Brunswick answered this question in the affirmative, and the Royal Trust Company appealed from this decision to the Supreme Court of Canada. The appeal was allowed with costs. The judgment of Duff, J., (now C.J.C.), referred to the fact that the question submitted by the stated case was limited to the question whether or not the mortgage debts as such had their situs in New Brunswick. In these circumstances, he pointed out that it was impossible to deal with the question on the hypothesis that the estate was to be dutiable to the extent only of the value contributed by the real security independently of the personal responsibility of the mortgagor. He was accordingly of the opinion that the answer to the question was governed by the decision of the Privy Council in *Hope's* case. Although the decision in that case was not followed by the Judicial Committee in *Rex v. Toronto General Trusts Corporation*, *supra*, one cardinal fact, which materially affected the decision in the latter case, was that the mortgage had been executed in duplicate. In this respect it was distinguishable from the facts in the *Ferguson* estate.

#### Land Contracts.

Contracts under seal for the sale of land have been held to be locally situate in the province where such contracts are found, following the rule in *Hope's* case.

*In re Muir Estate; Standard Trust Company v. Treasurer of Manitoba* (1915), 8 W.W.R. 1226; 51 S.C.R. 428; 23 D.L.R. 811; affirming 6 W.W.R. 995; 28 W.L.R. 358; 18 D.L.R. 144; 24 Man. R. 310. The assets of Robert Muir, deceased, late of Winnipeg, Manitoba, included certain agreements for sale of land in the Province of Saskatchewan. These agreements were in the possession of the deceased at Winnipeg at the time of his death. The Supreme Court of Canada held that they were locally situate in the Province of Manitoba, and were liable to succession duty in that province.

*Schmidt v. Provincial Treasurer of Alberta* (1935), 4 D.L.R. 752; (1935), 3 W.W.R. 498.

This was an appeal by the administrator of the estate of Mathias Schmidt from the judgment of Ford, J., declaring that an agreement for sale affecting lands in Saskatchewan was subject to duty in Alberta. The deceased at the time of his death was domiciled in the Province of Alberta and was the registered owner of the West half of Section 27 and the East half of Section 28, both in township 21, range 24, West of the third meridian, in the Province of Saskatchewan. He had sold the same on March 18, 1929, to one John Martin by written agreement for sale executed in duplicate under seal for \$17,950.00, payable by instalments at Sceptre, Saskatchewan. The deceased's copy of the agreement was in his safety deposit box in Edmonton, Alberta, at the time of his death, and the purchaser's copy at that time was in the possession of the purchaser within Saskatchewan.

It was held that the debt payable under the Agreement, being a specialty, was situated in Alberta where the Agreement was found at the time of death, notwithstanding that the purchaser's duplicate copy of the Agreement had been retained in Saskatchewan, and that such debt was accordingly subject to duty in Alberta.

The decision in *Rex v. Toronto General Trusts Corporation*, *supra*, as to the situation of mortgages executed in

duplicate was held to have no application to the agreement for sale in question for the reasons stated by McGillivray, J.A., as follows:—

"In the *Toronto General Trusts* case it was of first class importance that one copy of the duplicate mortgage was in the hands of the Registrar of the Land Titles Office in Alberta; indeed this fact made the general rule as to situs with respect to specialty documents inapplicable in that case, but it is to be remembered that in that case the mortgagee was possessed of all copies of the duplicate mortgages and it was for his own benefit and security that he by his own act caused one of the duplicates to be registered in the Alberta Land Titles Office while the other was taken to his place of business in Ontario; in short the movement of the duplicate mortgages to the places where they were found after the death, was by the mortgagee. If a creditor chooses to place one copy of a mortgage or deed made in duplicate in one jurisdiction, and the other copy in another jurisdiction, certainly on the authority of the *Toronto General Trusts* case the general rule as to situs is without application. Equally is this true if a vendor under an agreement for sale of land is possessed of more than one executed copy of the agreement and places them in different jurisdictions, but it is quite a different thing to say that possession of an extra copy of a mortgage, deed, or agreement for sale, by the debtor, serves to fix the situs of the specialty debt created by the instrument, a copy of which he holds."

Notwithstanding that the debt created by an agreement for sale of land may be found to be subject to succession duty in a jurisdiction other than where the land is situate, this does not prevent duty being claimed in respect of the vendor's interest in the land by the province in which the land is located.

*Vaughn v. Attorney-General for Alberta* (1924), 2 W.W.R. 821; (1924), 3 D.L.R. 467; 20 A.L.R. 424.

William R. Vaughn, who was resident and domiciled in the State of Oregon, agreed, by writing under seal, to sell land owned by him in the Province of Alberta, the pur-

chaser going into possession. The purchase money was to be paid, with interest, at a named place in Oregon. At the time of the agreement, the vendor executed a transfer under the Alberta Land Titles Act, which, together with the duplicate certificate of title, were deposited in escrow in Oregon for delivery to the purchaser on payment. At the death of the vendor in Oregon, there was a balance owing to him under the agreement. One duplicate of the agreement was held in Oregon on the deceased vendor's behalf, and the other was held by the purchaser in Alberta.

It was held by the Supreme Court of Alberta that the deceased, at his death, was the owner of property situated in Alberta or of an interest in Alberta land under and by virtue of the agreement, and that such property or interest was liable to duty in Alberta under the Succession Duties Act, 1914.

The judgment of the Court was delivered by Clarke, J.A., who referred to the remarks of Lord Watson in *Walsh v. Reg.* (1894), A.C. 144, at p. 148, and proceeded:

"Whatever may be said as to the locality of the debt, in my opinion an answer either way does not determine the question whether or not the deceased had at the time of his death, property within Alberta which passed on his death. The principle of the decision in *Walsh v. Reg.* is I think applicable here. It cannot be said that the deceased had no interest in the Alberta lands. The exact definition of that interest has been the subject of considerable judicial discussion, the latest deliverance upon the subject that I know of being the judgment of Mr. Justice Duff in *Rex v. Caledonian Insurance Company* (1924), S.C.R. 207. If the agreement be fully performed on the part of the purchaser by payment, the land would be held by the vendor in trust for the purchaser, but pending such full performance the vendor has a lien for the unpaid purchase price which I think is an interest within the meaning of the Act and in the not impossible event of the non-completion of the contract the debt may by abandonment or rescission of the contract or otherwise cease to exist, and the vendor

would have the beneficial as well as the legal interest. So that in either event the vendor has an interest in the land, subject to succession duty."

Duff, J., in delivering judgment in *Royal Trust Company v. Provincial Secretary-Treasurer for New Brunswick* (1925), S.C.R. 94, stated that in his opinion interests in land under mortgage or otherwise may be subject to succession duty in the province where the land is situated. He says: "There would appear to be little doubt—the decisions in *Walsh v. Reg.* (1894), A.C. 144, and *Henty v. Reg.* (1896), A.C. 567, seem to be conclusive upon the point—that, irrespective of the constructive situs of the personal debt, the fiscal authority of a Canadian province must embrace the power to levy duties upon interests in real estate situate within the province (whatever the limitations or conditions by which such interests may be affected) upon the creation, transfer or transmission of them."

### Bank Deposits.

Although branch banks are agencies of one principal firm, it is well settled that for certain special purposes of banking business they may be regarded as distinct trading bodies. Thus, it was held in *Woodland v. Fear* (1857), 7 E. & B. 519, that the obligation of a bank to pay the cheque of a customer rested primarily on the branch at which he kept his account, and that the bank in that case had rightfully refused to cash the cheque at another branch. Similarly, the case of *Clode v. Bayley* (1843), 12 M. & M. 51, shews that different branches of the same establishment may be endorsers from one to the other, and that, in case of dishonour, notice need not be given direct to the principal establishment, but that each branch in succession is entitled to notice. In these cases, the Courts, having regard to the necessary course of business between the parties, held that the bank had in some measure localized its obligations to its customer or creditor, so as to confine it, primarily at all events, to a particular branch.

The principles thus laid down are followed in the determination of the situs of bank deposits for purposes of succession duty, and the actual location of the branch of the bank in which such deposits have been made is accordingly the deciding factor.

*Attorney-General v. Newman*, 1 O.L.R. 511, affirming 31 O.R. 340.

This was an action brought by the Attorney-General of Ontario against the personal representatives of Daniel Scotten, deceased, to recover succession duty on certain moneys deposited in Ontario banks, forming part of the assets of the deceased. The deceased was domiciled, in his lifetime, in the State of Michigan.

Boyd, C., gave judgment for the amount claimed on the ground that the money represented by the deposit receipts had to be received by the personal representative of the testator in the country of deposit, and that this could only be done by a properly appointed or properly constituted local administrator.

This judgment was upheld by the Ontario Court of Appeal, and it was held that succession duty was payable in Ontario upon any property which could properly be administered only in that province.

*Rex v. Loritt* (1912), A.C. 212; 81 L.J.P.C. 140.

The testator, resident and domiciled in the province of Nova Scotia, at the time of his death was possessed of \$90,351.00 deposited in the New Brunswick branch of the Bank of British North America, the head office of which is in London. It was held by the Privy Council that the executors were liable to pay succession duty to the Province of New Brunswick on these deposits under the provisions of the New Brunswick Succession Duty Act, 1896, which assimilated the tax to a probate duty payable for local administration.

In the *Newman* and *Loritt* cases the deposit receipts were not in form negotiable, and it was expressly stated therein that they were not transferable. It has been held



that a negotiable deposit receipt is situate in the place where such receipt is found as at the time of the death of the deceased owner. *Re Bennett, Provincial Treasurer v. Bennett* (1936), 2 D.L.R. 291.

### **Bonds.**

The situs of bonds may be considered in relation to two classes of instruments, namely:—

- (a) Bearer bonds and securities transferable by delivery only; and
- (b) Bonds under seal, or specialties, which are not negotiable instruments.

### **Bearer Bonds and Securities.**

The situs of bearer bonds and securities transferable by delivery only is determined by the place where they are found at the time of the death of the deceased owner.

*Attorney-General v. Bouwens* (1838), 4 M. & W. 171; 7 L.J. Ex. 297; 51 R.R. 517.

In this case, it was held that the English probate duty was payable in respect of bonds of foreign governments, of which a testator dying in England was the holder at the time of his death, and which had come to the hands of his executor in England, such bonds being marketable securities within the kingdom, saleable and transferable by delivery only, and it not being necessary to do any act out of the kingdom in order to render the transfer of them valid.

*Attorney-General v. Glendining* (1904), 92 L.T. 87.

James William Smith, of Dunedin, New Zealand, died on 3rd June, 1902, in London, but domiciled in New Zealand. The testator at his death was possessed of certain bonds of foreign and colonial governments deposited by him at the Bank of New Zealand, London. These bonds were all bearer securities and transferable in England. It was held by Phillimore, J., that estate duty was payable thereon in England.

*Stern and others v. The Queen* (1896), 1 Q.B. 211; 65 L.J.Q.B. 240; 73 L.T. 752.

The deceased died in England possessed of securities for certain shares in the railways of the United States of America. These securities were certificates marketable in England, any transfer thereof being operative by delivery. It was held that probate duty was payable thereon in England as part of the testator's estate.

*Winans and another v. Attorney-General* (1908), 1 K.B. 1022; 98 L.T. 602; (1910), A.C. 27; 101 L.T. 754; 79 L.J.K.B. 156.

W. L. Winans died in 1897 in London, possessed of American, Russian, German and Prussian bonds. The deceased was domiciled in America at the time of his death. It was shown that the securities and property and documents of title relating to the property were all situate in England at the time of the death of the deceased, and that the securities were all bearer bonds transferable by delivery. It was held that the bonds were property situate in England, and were liable to the English estate duty.

### **Bonds Under Seal, but Not Negotiable.**

In *Brassard v. Toronto General Trusts Corporation*, 66 Que. S.C. 472, it was held by the Quebec Superior Court that the test of the situs of bonds which were not negotiable in character is where can such securities be effectively dealt with? In that case, the plaintiff in his capacity as collector of provincial revenue claimed from the defendant as executor and trustee the sum of \$6,281.10 and interest for succession duties upon 65 bonds of the West Kootenay Power and Light Company, forming part of the estate of the late Edwin Canfield Whitney, who died in Ottawa on 6th February, 1924, on the ground that these bonds were payable in the Province of Quebec, and that, having been registered with the Royal Trust Company in Montreal, they were situated in the said province.

It was held that the bonds, being registered in the Province of Quebec, where only a transfer could be effected, were property situate in that province and were liable to taxation there.

This decision of the Quebec Superior Court has been overruled by the subsequent decisions in *Royal Trust Company v. Attorney-General of Alberta* (1930), 1 D.L.R. 868; affg. (1929), 1 D.L.R. 923; 24 A.L.R. 357; and in *The King v. National Trust Company* (1933), 4 D.L.R. 465; S.C.R. 670; affg. (1933), 2 D.L.R. 474; 54 Que. K.B. 351. The true rule as to situs of bonds under seal is that applicable to specialties in general, namely, that such instruments are situated where they are found at the death of the owner.

"It was sought to liken," says Lord Merrivale (in the course of the judgment in the *Royal Trust Company's case*), "the bonds to the shares of a joint stock company so as to apply the principle affirmed in *Brassard v. Smith* (1925), 1 D.L.R. 528; 38 Que. K.B. 208; that in the case of such shares the test of local situation is supplied by the question, 'Where could the shares be effectively dealt with?' But these securities were statutory bonds and not shares. The conditions of the bonds as to registration are in no way analogous to the provisions in articles of association for the incorporation of shareholders in a joint stock company by the entry of their names on the register of shareholders at its authorized place of being."

### Shares in Companies.

The test of the situs of shares in any company is the question, where can such shares be effectively dealt with?

*Attorney-General v. Higgins* (1857), 2 H. & N. 339; 26 L.J. Ex. 403; 29 L.T.O.S. 184; 157 E.R. 140.

The deceased, who was domiciled at the time of his death in England, owned shares in railway companies in Scotland, and the question arose where the stamp duty in respect to the shares was payable. Martin, B., in the course

of his opinion, said: "It is clear that the evidence of title to these shares is the register of shareholders, and that being in Scotland, the property is located in Scotland."

*Receiver-General of New Brunswick v. Rosborough* (1915), 48 N.B.R. 258; 24 D.L.R. 354.

Among the assets of James Walker, deceased, was a certificate for shares in certain debenture stock of the City of Halifax, Nova Scotia, transferable only in that city. It was held by the Supreme Court of New Brunswick that the situs of this stock was in Halifax, and that succession duty was not payable thereon to the Province of New Brunswick.

*Smith v. Provincial Treasurer of Nova Scotia* (1919), 58 S.C.R. 570; 47 D.L.R. 108; affg. 35 D.L.R. 458; 51 N.S.R. 490.

This was a special case stated under the provisions of the Nova Scotia Judicature Act. The facts agreed upon were that one Wiley Smith died at Halifax, Nova Scotia, on the 28th February, 1916, and at the time of his death had his domicile in the Province of Nova Scotia; that the aggregate value of the property passing on the death of the said intestate exceeded \$100,000, consisting, *inter alia*, of 2,076 shares of capital stock of the Royal Bank of Canada of the value of \$442,168, or thereabouts; that the bank had its head office in Montreal, Province of Québec, and at the time of the passing of said property, and previously thereto, had maintained within the Province of Nova Scotia a share registry office under the provisions of section 43 of the Bank Act (Canada), at which the shares of shareholders resident within the Province of Nova Scotia were required to be registered, and that the shares in question were so registered there.

The Supreme Court of Nova Scotia gave judgment that the shares were liable to succession duty in the Province of Nova Scotia, on the ground that the share-register determined the locality thereof.

This judgment was upheld by the Supreme Court of Canada not only on the ground that the shares were locally situate in Nova Scotia, but also by reason of the application of the maxim *mobilia sequuntur personam*, the deceased, in his lifetime, having been domiciled in that province.

It is thought that this judgment is erroneous so far as it concerns the application of the maxim *mobilia sequuntur personam*, having regard to the later decision of the Privy Council in the *Kerr* case. Section 6 of the Nova Scotia Succession Duty Act, 1912, imposed the tax upon property by reference to its physical or local situation, and thus brings the measure within the same category as the Alberta Legislation which was found to be *ultra vires*.

*Attorney-General of Nova Scotia v. De Lamar*, 61 D.L.R. 251; 54 N.S.R. 497.

The testator, a citizen of the United States of America, and having his domicile in the City of New York, bequeathed to his daughter, also a citizen of the United States and domiciled in New York, certain shares of common stock of the Nova Scotia Steel and Coal Company, a company incorporated by special acts of the Nova Scotia Legislature, having its head office at New Glasgow in that province. The company's stock was listed on the New York stock exchange and the Equitable Trust Company of New York was the transfer agent of the shares of the company in New York and was authorized by resolution of the directors of the company to issue and countersign, when properly signed by officers of the company, an issue of certificates of shares of common stock to the number of 75,000 certificates and also to keep the necessary records in connection therewith. The National Trust Company of Montreal, and of Toronto, and the Old Colony Trust Company of Boston, and the Bankers Trust Company of New York, were appointed agents of the company each with the title of Registrar for the registration of certificates for the 75,000 shares of common stock, and these registrars were directed to register and countersign as registrar, certificates for not exceed-

ing 75,000 shares of common stock when signed by the officials of the company and countersigned by the transfer agent of the company in the same city as the registrar.

The Supreme Court of Nova Scotia held that as the certificates for the shares bequeathed were in New York at the time of the death of the testator they could not be said to be property situate in Nova Scotia within the meaning of section 7 of the Nova Scotia Succession Duty Act, 1917, as they could be transferred in New York, where they were registered, without reference to any one in Nova Scotia, and without invoking the aid of the laws of the province, and it not being necessary to come to Nova Scotia for administration of the estate or for ancillary probate, everything necessary being able to be done in New York, and that such shares were not subject to the payment of duty under the Act.

In order to counteract the effect of this decision, it was provided by chapter 30 of the Statutes of Nova Scotia, 1922, that the property liable to succession duty should include "all shares, stocks, bonds, debentures and other securities whether heretofore or hereafter issued or made by any corporation whether heretofore or hereafter incorporated by or under an Act of the Legislature of Nova Scotia which have passed on the death of any person as aforesaid, or which pass on the death of any person as aforesaid, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere, and which are or were or any interest in which is or was at the time of his death registered or standing in the name of the deceased or in trust for him on a register or book kept for the purpose, whether in Nova Scotia or elsewhere, and whether such shares, stocks, bonds, debentures or other securities were before this enactment, validly and effectually transferable or assignable in Nova Scotia or elsewhere; no transfer nor assignment, nor devolution by will, intestacy or otherwise of any such shares, stocks, bonds, debentures or other securities in respect of which the Legislature of Nova Scotia has authority in this behalf, and no entry made on any such

book or register of any such transfer or assignment or devolution shall be valid or effectual unless and until all succession duty thereon is paid."

The same provision has been carried forward, and now appears as clause (c) of section 7 of the present Nova Scotia Succession Duty Act.

*Levesque v. Smith* (1923), 3 W.W.R. 388, varying 34 Que. K.B. 439.

This was an appeal to the Supreme Court of Canada from the judgment of the Court of King's Bench, Appeal Side, Province of Quebec.

The respondent, acting on behalf of the Province of Quebec, claimed from the appellants, executors of the estate of the late Wiley Smith, domiciled at his death in Halifax, succession duties on the following: first, on 2,076 shares of the Royal Bank of Canada, having its head office in Montreal, but having established at Halifax a local registry under section 43 of the Bank Act; and secondly, on 100 shares of the Montreal Trust Company, incorporated by the Quebec Legislature, and 175 shares of the Abbey Fruit Salts Company, incorporated under a Dominion charter, both having their head offices in Montreal.

It was held that the executors were not liable to pay succession duty on the shares in the Royal Bank of Canada as such shares had already been declared by a judgment of the court to be situated in the Province of Nova Scotia. See *Smith v. Provincial Treasurer of Nova Scotia* (1919), 58 S.C.R. 570.

The court was equally divided on the question whether the shares in the Montreal Trust Company were liable to duty in the Province of Quebec. The head office and the place of registration of the shares concurred, and the shares could only be transferred in Montreal. The Quebec statutes, however, made the liability to duty depend on actual situs. Anglin, J., held that the expression "actually situate" meant "physically situate," and that, as the shares in question were intangible property, they could not be

"actually situate" within the province. In this view he was supported by Davies, C.J., and Idington, J.

Duff, J., in his judgment, expressed the opinion that "actually situate" is an expression used to exclude the fictitious or notional situation, derived from the rule *mobilia sequuntur personam*, and that the expression could be properly applied to intangible property. He held, therefore, that the shares in question were actually situate in Quebec, and were liable to duty in that province. Brodeur and Mignault, JJ., concurred.

Appeal was taken from the judgment of the Supreme Court of Canada in *Levesque v. Smith* to the Judicial Committee of the Privy Council, and this appeal is reported, *sub nom.*

*Brassard v. Smith et al.* (1925), Vol. 1, W.W.R. 311.

The appeal was confined solely to the finding of the Supreme Court of Canada regarding the situs of the shares in the Royal Bank of Canada. Lord Dunedin, in delivering the judgment of the Judicial Committee, said:

"Their Lordships consider that the question was really settled by the case of *Atty.-Gen. v. Higgins*, 2 H. & N. 339; 26 L.J. Ex. 408. Baron Martin, in that case, says in so many words: 'It is clear that . . . the evidence of title to these shares is the register of shareholders, and, that being in Scotland, this property is located in Scotland.' It is quite true that in that case the head office as well as the register was in Scotland, but in their Lordships' view it is impossible to hold that in that case the position of the head office was the dominant factor merely on the strength of a phrase used by the reporter of the Attorney-General's argument, and a casual reference made to the case by Lord Esher in a subsequent case of *Atty.-Gen. v. Sudeley* (1896), 1 Q.B. 354. In the present case, Duff, J., dealing with the 'no local situation' argument, said as follows: 'And the Chief Baron's judgment, I think, points to the essential element in determining situs in the case of intangible chattels for the purpose of probate jurisdiction as 'the circum-



stance that the subjects in question could be effectively dealt with within the jurisdiction.'"

"This is, in their Lordships' opinion, the true test. Where could the shares be effectively dealt with? The answer in the case of these shares is in Nova Scotia only, and that answer solves the question."

*Untermeyer v. Attorney-General of British Columbia* (1929), 1 D.L.R. 315; S.C.R. 84; affg. (1928), 3 D.L.R. 311; 39 B.C.R. 533.

The deceased was, in his lifetime, domiciled in New York, and was the owner of 318,800 shares of stock in Premier Gold Mining Company. The mining property of the Company was in British Columbia, as was also the head office and place of registration. The Supreme Court of Canada held that the shares were situate in British Columbia, where they could be effectively dealt with.

*The King v. Cutting* (1932), 3 D.L.R. 273; S.C.R. 410; affg. 51 Que. K.B. 32; affg. (1930), 2 D.L.R. 297; 68 Que. S.C. 541.

The plaintiff Cutting was executor of McEvers Bayard Brown and claimed from the Province of Quebec reimbursement of \$13,500.00 succession duty paid upon 275 shares in the capital stock of the Bank of Montreal. The shares were registered only in New York City and transferable there. The claim was allowed, and it was held that the principle that for succession duty purposes bank shares are locally situate in the place where they may be effectively dealt with applies to the case of shares owned by non-residents of Canada and registered at a share registry established outside of Canada. Accordingly where the directors of a bank having its head office in Canada by by-law passed under the authority of subsection 5 of section 42 of the Bank Act have authorized the opening of a share registry office in a foreign country and have designated it as a place whereat shares of persons resident therein shall be registered and transferred the result is that shares once registered at such foreign registry office are only

transferable there and are not locally situate within any Province of Canada for the purpose of succession duties.

If a company is required by the law of a particular province to keep its register there, shares in the company are situate in that province, notwithstanding that the register is kept elsewhere.

*Erie Beach Company, Ltd. v. Attorney-General for Ontario* (1930), A.C. 161; (1930), 1 D.L.R. 859; affg. (1929), 2 D.L.R. 754; 63 O.L.R. 469; revg. (1928), 1 D.L.R. 739; 61 O.L.R. 507.

In an action upon an agreed statement of facts the Erie Beach Company, Ltd., prayed a declaration that certain shares of its capital stock registered in the name of Frank V. E. Bardol, deceased, and other like shares allottable to him under a contract of his with the company were not upon his death subject to duty under the Ontario Succession Duty Act.

Bardol was at all material times domiciled in the State of New York. The plaintiff Company was incorporated in Ontario under the Ontario Companies Act. Section 118 of that Act required the register of shares and shareholders of companies incorporated in Ontario to be kept within the province. Every meeting of the company took place in the City of Buffalo; the management of the company's business was conducted from its office in Buffalo; its books, records and documents were kept there; the common shares actually issued were issued there, and such transfers as took place were made and recorded there.

In these circumstances, it was held that the shares were situated in Ontario, and liable to duty there, the place where the register was required by law to be kept determining the locality of the shares.

Even if the whole business of a company is carried on in a country other than in which the register is properly kept, nevertheless the situs of shares in the company is determined by the place of registration.

*Baelz v. Public Trustee* (1926), Ch. 863; 95 L.J. Ch. 400; 135 L.T. 768; 42 T.L.R. 696.

The plaintiff was a German national resident in Germany, and at the date when the charge imposed by the Treaty of Peace Order, 1919, attached to all property belonging to German nationals he was beneficial owner of certain shares in a company which was registered in England but carried on business wholly in Holland. It was held that the plaintiff's interest in the shares was property "within His Majesty's Dominions," and was subject to the charge created by the Order.

#### **Companies With Duplicate Registers.**

There are numerous companies registered in Canada with duplicate registers in London, England, and elsewhere. The locality of shares in such companies is determined by the place where the share certificates are found at the time of the death of the deceased owner, if there is a register in that place.

*Re Clark, McKeehan v. Clark* (1904), 1 Ch. 294; 73 L.J. Ch. 188; 89 L.T. 736; 52 W.R. 212; 20 T.L.R. 101.

The testator, W. G. Clark, died domiciled in England. His assets included shares in South African companies, transferable either in South Africa or London, but with the head offices in South Africa. The share certificates were deposited with a London bank. It was held that the situs of the share certificates determined the situation of the property, and that the shares passed under a gift of property situate in England.

*Re Ashcroft, Clifton v. Strauss* (1927), 1 Ch. 313; 96 L.J. Ch. 205.

The testator, a German, was at the outbreak of war entitled to shares and securities in English, South African, and American companies. The certificates were in London and the securities themselves were transferable in London. The testator died on May 5, 1915, domiciled in Germany. The will was proved in Germany in 1915 and in 1922 grant of administration in England was made to the plaintiff. By Treaty of Peace Orders the interests of the foreign beneficiaries became subject to the claims of the English Custo-

dian. The South African shares were, in 1922, transferred to the South African Custodian. Some of the American shares were transferred to the American Custodian, and the remainder were released to the plaintiff. On a summons taken out to determine whether estate duty was payable upon all or any of the various securities, it was held that the securities were locally situate in England, the location not being altered by the temporary suspension of the testator's power to dispose of them, and the administrator was accountable to the extent of the assets received for estate duty.

*Re Macfarlane* (1933), 1 D.L.R. 345; O.R. 44.

The deceased Macfarlane was a resident of and domiciled in Montreal. He died there on March 29, 1930. At the time of his death he owned 1,000 shares of International Nickel Company of Canada. The head office of the company was at Copper Cliff in the Province of Ontario. Before Macfarlane's death the company had established four transfer agencies, namely, Montreal, Toronto, New York, and London, England. The share certificates were in Macfarlane's possession at the time of his death. It was held that the shares could have been effectively dealt with in Montreal, and that they were not subject to succession duty in Ontario.

### Partnership Property.

The situs of a share of a deceased partner is where the business is carried on.

*Commissioner of Stamp Duties v. Salting* (1907), A.C. 449; 97 L.T. 225; 76 L.J.P.C. 87.

William Severin Salting died on 23rd June, 1905. During his lifetime, the deceased and his brother George Salting resided in England. They were partners in equal shares, though without any written agreement of partnership, in the business of graziers and sheep farmers, carried on by their agent in New South Wales. The assets of the partnership consisted of lands, live stock, and other property. It was held by the Privy Council that the business was carried on in New South Wales, and that the share of the deceased

therein was subject to duty under the Stamp Duties Act, 1898, of New South Wales, as amended by the Probate Duties (Amendment) Act, 1899.

*Beaver v. Master in Equity* (1895), A.C. 251; 72 L.T. 127; 64 L.J.P.C. 126.

In an action for probate duty it appeared that the deceased had been a member of a partnership firm. The estates cultivated by the firm were situated in India, and the business properly so called was entirely carried on there. There were sixteen partners, all but two of whom resided in the United Kingdom. The Privy Council held that the share or interest of the deceased in the partnership was not property situated in the United Kingdom, and was therefore not liable to probate duty.

See also *Laidlay v. Lord Advocate* (1890), 15 App. Cas. 468; 17 R. (H.L.) 67.

Goodwill is situate where the business, to which it is attached, is carried on. *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd.* (1901), A.C. 217; 70 L.J. K.B. 677; 84 L.T. 729; 17 T.L.R. 530.

### Partnership Lands.

The interest of a deceased partner in partnership land is subject to succession duty in the province where such land is situated.

*Boyd v. Attorney-General for British Columbia* (1917), 2 W.W.R. 242; 54 S.C.R. 532; 36 D.L.R. 266.

The estate of Mossom Martin Boyd, deceased, included a share or interest in certain real estate in British Columbia standing at his death in his name and in that of his partner William T. C. Boyd. The deceased and his partner were domiciled in Ontario at the time of the death.

The executors of the will of the deceased petitioned the Court for a declaration that the properties in question were not liable for succession duties in British Columbia because they were acquired by the partnership funds; and although standing and held in the names of the individual partners

were so held by them on behalf of and as part of the assets of the partnership . . . and that as the business of the partnership was carried on in Ontario, where the head office was, and where the books were kept, the interest of the deceased partner in these partnership lands was not liable to succession duty under the British Columbia Act.

The Chief Justice of the Supreme Court of British Columbia dismissed the petition without stating his reasons.

On appeal to the Court of Appeal for that province, the Court was equally divided, and the judgment of the Chief Justice therefore stood.

On a further appeal to the Supreme Court of Canada, it was held by a majority of that Court, Davies and Anglin, JJ., dissenting, that the interest of the deceased in the partnership lands was subject to succession duty in British Columbia.

### Judgment Debts.

A judgment debt is situate in the country where the judgment is recorded. *Gold v. Strode* (1690), Carth. 148; *Attorney-General v. Bouwens* (1838), 4 M. & W. 171; 7 L.J. Ex. 297; 150 E.R. 1390.

### Insurance Policies.

The situs of a debt owing under a policy of insurance is *prima facie* that of the company's head office, if the policy is not under seal and constitutes a simple contract debt. If the policy is under seal, the rule as to situs of specialties applies. *Garney v. Rawlins* (1836), 2 M. & W. 87.

Although the situs of a policy not under seal is generally determined by the location of the head office, it is necessary to look at the terms of the contract, and if the debt is in fact localized to one particular branch of the company, it is situate in the country in which that branch is situate. The same result follows if by the terms of a provincial insurance statute the debt is localized and made payable in that province.

*Re Templeton*, 6 B.C.R. 180.

This was an application by Originating Summons to determine the amount of succession duty (if any) payable to the Province of British Columbia by the executrix of William Templeton, deceased, in respect of five policies of insurance effected by him on his life. The Succession Duty Statute in force in British Columbia at the time of the death of the deceased, 61 Vict., ch. 175, provided that all property situate within the province, passing by will or intestacy, should be subject to succession duty. During his lifetime the deceased had taken advantage of the provisions of section 7 of the Families Insurance Act, R.S.B.C. 104, and by a writing identifying three policies by their respective numbers had declared these three policies to be for the benefit of his wife. Two other policies were payable to the estate of the deceased, but by the contracts the moneys were payable at places outside the province. The deceased was domiciled in the province at the time of the death. Irving, J., held that succession duty was not payable on the insurance moneys for the following reasons, namely: (a) The three policies for the benefit of the wife of the deceased formed no part of his estate, and, therefore, could not pass by his will; (b) The statute confined the taxation to "property situate within the province," and the moneys payable under the remaining two policies were not so situate for the reason that the moneys were payable without the province.

*New York Life Insurance Company v. Public Trustee* (1924), 2 Ch. 101; 93 L.J. Ch. 449; 131 L.T. 438; 40 T.L.R. 430.

In this case, the terms of section 1 of the Treaty of Peace Order, 1919, were under consideration. By this section, all property rights and interests within His Majesty's Dominions belonging to German nationals on January 10, 1920, were charged with certain payments. The plaintiffs were a life insurance company incorporated in New York and carrying on business there and they had branch offices in London and elsewhere. At the date mentioned certain sums had become due from the plaintiffs to German nationals under policies of insurance issued by the plaintiffs before

the war. The policy moneys were payable in London. In an action against the Custodian of Enemy Property for a declaration that the policies were not subject to the charge, it was held that the Treaty of Peace did not exclude life insurance policies from the charge, and as the moneys owing by the plaintiffs to German nationals were debts which were primarily recoverable in London, these debts were, at the date in question, within His Majesty's Dominions and accordingly were subject to the charge. In the course of his judgment, the Master of the Rolls said:—"to him it appeared that the proper course was to look at the contracts (the policies) and determine from their terms where the debts were to be recovered."

Certain of the provincial insurance enactments provide for the payment of insurance moneys in the province in which the policy was taken out. Such a provision is regarded, in the case of simple contract obligations, as localizing the debt to that province. A statutory provision of this character was considered in *Rudolph v. Continental Life Insurance Company* (1915), 9 O.W.N. 327. In that case it was held that the statute in effect became part of the insurance contract, and that the policy having been issued in Alberta, the company could exonerate itself by paying the insurance moneys into Court in Alberta, notwithstanding the fact that the policy provided for payment in Ontario, where the head office of the company was situate. It was also held that the effect of the statute was to supersede the policy provision and to make the money payable in Alberta.

In *Pritchard v. Standard Life Assurance Company* (1884), 7 O.R. 188, the deceased was domiciled in Ontario and the policy moneys were payable in Quebec. The insurance company refused to make payment on the ground that the executors had only taken out Letters Probate in the Province of Ontario, where the deceased had been domiciled at the time of his death, and had not taken steps to have the Letters resealed in the Province of Quebec. The contention was upheld, the Court agreeing with the view expressed by



the defendants that administration in Ontario did not clothe the executors with authority to demand payment of the policy moneys which were payable in Quebec.

Section 43 of the Alberta Insurance Act, 1915, chapter 8. was under consideration *In re Mellon Estate* (1920), 3 W.W.R. 413; 53 D.L.R. 664. This section provided that moneys payable under a policy of life insurance shall "be payable in the province, when the assured is or dies domiciled therein, notwithstanding anything contained in any policy or the fact that the head office of the insurance corporation is not within the province." It was held that this provision did not do more than declare that the situs of the debt should be in the Province of Alberta and did not make the law of Alberta apply in determining the construction of the contract.

### Interests in Estates.

On the death of a residuary legatee under the will of another person, or on the death of a person entitled to share in the distribution of the estate of another person upon intestacy, while the original estate is still being administered, the locality of these estate interests is determined by the residence of the personal representatives of the original testator or intestate. *Sudeley v. Attorney-General* (1897), A.C. 11; 66 L.T.Q.B. 21; 75 L.T. 398; 13 T.L.R. 38; *Barnardo's Homes v. Special Income Tax Commissioners* (1921), 2 A.C. 1; 90 L.J.K.B. 545; 125 L.T. 250; 37 T.L.R. 540.

*In re Estate of Sophia Lunn*, deceased (1925), 2 W.W.R. 608; 35 B.C.R. 411.

William Fernie died in British Columbia and by his will left one-third of his residuary estate to Sophia Lunn. His executors paid all the succession duty on his estate, but Sophia Lunn died in England before her share of the estate was delivered over. After probate was issued to her executor in England he petitioned for the resealing of the probate in British Columbia. This was refused until succession

duty was paid upon the portion of the estate of William Fernie that was bequeathed to her.

It was held, on appeal, affirming the decision of Morrison, J., that duty was properly payable on the sum to be received by the executor of Sophia Lunn from the estate of William Fernie.

#### (b) Foreign Property.

Under no circumstances can property situate outside of the boundaries of a province be taxed by a Provincial Legislature. This is made abundantly clear by the decision of the Privy Council in *Provincial Treasurer of Alberta v. Kerr* (1933), A.C. 710; 102 L.J.P.C. 137; 149 L.T. 563; 50 T.L.R. 6, P.C.; (1933), 4 D.L.R. 81. Prior to that decision there had been a number of judgments delivered in the Canadian Courts to the effect that foreign property might be brought within the ambit of taxation by the application of the doctrine *mobilia sequuntur personam*. In giving expression to the view that this doctrine cannot be applied in this way, Lord Thankerton said:

"The province next contended that, although locally situate outside the province, the personal property of a person, who dies domiciled within the province, is to be treated as 'within the province' for the purposes of section 92 of the British North America Act, by reason of the application of the rule embodied in the maxim *mobilia sequuntur personam*. This argument appears to proceed on a misunderstanding of the meaning and effect of that rule. If A dies domiciled in the United States of America, leaving movable property locally situate in England, the latter country has complete jurisdiction over the property, but the law of England, in order to decide on whom the property devolves on the death of A will not apply the English law of succession, but will ascertain and apply the American law. In other words, it is the law of England—not the law of America—that applies the principle of *mobilia sequuntur personam*, the *locus* of the latter remaining unchanged; in no sense could the property be described as 'within America'."

In the judgment delivered by him in *The King v. National Trust Company* (1933), S.C.R. 670; (1933), 4 D.L.R. 465; Duff, C.J.C., refers to the effect of the Privy Council decision in these terms, namely:—

“Some propositions pertinent to that issue may, we think, be collected from the judgments of the Judicial Committee of the Privy Council, if not laid down explicitly, at least, as implicit in them. First, property, whether movable or immovable, can, for the purposes of determining situs as among the different provinces of Canada in relation to the incidence of a tax imposed by a provincial law upon property transmitted owing to death, have only one local situation. In applying this proposition, of course, it is necessary to distinguish between a tax upon property, and a tax upon persons domiciled or resident in the province.”

In the *Kerr* case the observations of Lord Thankerton were intended to emphasize the fact that the physical or actual situation of property could not be changed by the application of a Latin maxim. Despite these observations, however, it is thought that the maxim is still applicable in the construction of provincial succession duty enactments which impose taxation upon or in respect of the succession, considered as a right or privilege conferred by the law of the domicile, as distinct from an imposition upon outside property directly. In *Attorney-General v. Campbell* (1872), L.R. 5 H.L. 524; 41 L.J. Ch. 611; Lord Westbury said: “If a man dies domiciled abroad possessed of personal property, the question of whether he has died testate or intestate, and also all questions relating to the distribution and administration of his personal estate, belong to the judge of the domicile, and that on the principle of *mobilia sequuntur personam*. His domicile sets up the forum of administration. The legatees would resort to that forum to receive their legacies, and the executors and trustees, when the residue had been ascertained, would resort to that forum to receive it.” It would appear from this quotation that by reason of the application of the maxim *mobilia sequuntur personam*, the succession to a deceased's personal estate, wherever sit-

uate, is governed exclusively by the law of the domicile. In other words, the right of sharing in the succession is, from a legislative standpoint, one and indivisible, and it seems logical to conclude that the country of the domicile can impose taxation in respect of the succession, as being a matter within its exclusive legislative control. But apart from the question as to the application of the maxim *mobilia sequuntur personam* to provincial legislation, it is considered that taxation upon or in respect of a succession can be supported as a tax upon a benefit conferred by the law of the domicile. In the *Alleyne-Sharple* case, Duff, J., (now C.J.C.), refers to the alternative views expressed as to this mode of taxation in these terms, namely:—

“Emphasis is sometimes laid upon the fact that the benefit is a benefit derived from the law of the domicile, see, e.g., *Wallace v. Attorney-General*, 1 Ch. App. 1, per Lord Cranworth. In other cases *mobilia sequuntur personam* and the ascription of a notional situs to the movable succession at the place of the domicile is treated as the ground of jurisdiction, as by Lord Herschell in *Colquhoun v. Brooks*, 14 App. Cas. 493, at p. 503.”

The maxim *mobilia sequuntur personam* has been widely applied in the construction of death duty enactments, both English and Colonial, and the following decisions are referred to in illustration:—

*Wallace v. Attorney-General* (1865), 1 Ch. App. 1; 35 L.J. Ch. 124; 13 L.T. 480; 14 W.R. 116.

The deceased had been domiciled in France during his lifetime, and, by his will, had disposed of a sum of English Consols. Lord Cranworth, in giving judgment, held that the provisions of the English Succession Duty Act, 1853, must be given some limitation and that they must be confined “to persons who become entitled by virtue of the laws of this country.”

*Harding v. Commissioners of Stamps of Queensland*, (1898), A.C. 169.

In this case, the Queensland Succession and Probate Duties Act, 1892, received judicial construction. It was held that section 4 of the Act defining a "succession" (being the same as section 2 of the English Succession Duty Act of 1853) must be read in the sense affixed to the English Act by the English tribunals; and that it did not include movables locally situate in Queensland which belonged to a testator whose domicile was in Victoria. Per Lord Hobhouse: "As regards locality, it is clear that the assets now in question have locality in Queensland; but that does not affect the beneficial interest to which succession duty is attached, and which devolves according to the law of the owner's domicile."

*Blackwood v. The Queen*, 8 A.C. 82.

The Colonial Full Court decided that by reason of the maxim *mobilia sequuntur personam*, personal property in the nature of movable property outside the colony, belonging to a testator domiciled in the colony, was liable to the duty imposed by the Colonial statute. This decision was reversed by the Privy Council on the ground that it was not made apparent by the statute that the Colonial Legislature intended that the maxim should apply.

*Lambe v. Manuel* (1903), A.C. 68; 72 L.J.P.C. 17.

This action was brought for the recovery of succession duties alleged to be due on the part of the estate of Allan Gilmour, deceased, who, in his lifetime, was a resident of Ottawa, Ontario, and died there on the 25th day of February, 1895. At the time of his death, part of his movable property was locally situate in Quebec, and an action was brought by the collector of provincial revenue for the district of Montreal, for the recovery of Quebec succession duties on this property. The statute on which the action was based provided that, "All transmissions, owing to death, of the property in, usufruct, or enjoyment of, movable and immovable property in the province, shall be liable to the following taxes, calculated upon the value of the property transmitted after deducting debts and charges existing at the time of the death." (Art. 119b, as amended by 57 Vict.,

ch. 16.) It was further provided by Art. 600cc that, "the place a succession devolves is determined by the domicile." It was held by the Privy Council that, on the wording of the statute, succession duty is payable only on property which the successor claims under the law of Quebec and is not payable on a succession devolving under the law of another province. The claim for duty was accordingly disallowed.

The judgment of the Quebec Superior Court in this case contains the following passage; "The rule *mobilia sequuntur personam* is well recognized in our law, and also in the law of England in interpreting the legacy and succession duty Acts in force there. The Legislature has embodied this rule in Art. 600cc which enacts that 'movable property is governed by the law of the domicile of its owner.' The second section of the English Succession Duty Act seems to be drawn in as broad and general terms as ours; yet, if I understand correctly the ruling in the English courts, if this property were in England it would not be subject to either legacy or succession duty. The power of the Legislature to levy a tax upon movable property situate in this province irrespective of where the testator is domiciled or the succession devolves, cannot be doubted, and it would not have been difficult to find language to express its intention to exercise it. The statute should, I think, be looked at as a whole, and should be interpreted in favour of the defendant, not only because the general principle is that every statute imposing a tax or penalty is to be construed strictly, but because the effect of imposing this tax upon the defendant will make him pay a succession duty twice, inasmuch as he has already paid to the Ontario Government. The Legislature of that province has been careful to make its intention clear. Section 2, R.S.O., ch. 24, defines what property is subject to succession duty:— '(a) All property situate in this province . . . whether the deceased person owing or entitled thereto was domiciled in Ontario at the time of his death or was domiciled elsewhere, passing by will or intestacy.' "

The maxim *mobilia sequuntur personam* is inapplicable to gifts *inter vivos* of outside property where such gifts take effect under the laws of a province or country other than that in which the donor is domiciled at the time of death.

*Attorney-General for Ontario v. Woodruff* (1908), A.C. 508.

This action was brought by the Crown to recover succession duties upon the estate of one Woodruff, deceased, who died in St. Catharines, Ontario, in 1904. He was the owner of debentures of municipal corporations in various parts of the United States, deposited with a trust company in New York City. Part of these securities were transferred to his four sons in 1892 and the remainder in 1902 by a document executed in Ontario. It was held by the Privy Council that the British North America Act, 1867, section 92, subsection 2, does not confer upon a province the power to tax property not within the province. And that the Succession Duty Act, R.S.O., 1897, ch. 24, does not apply to movable property situate outside the Province of Ontario, which a domiciled inhabitant of that province had transferred in his lifetime with intent that the transfers should only take effect after his death.

In the later case of *Smith v. Provincial Treasurer of Nova Scotia*, Anglin, J., comments on the *Woodruff* case in the following terms:

"There is certainly nothing in the Act to prevent the maxim *mobilia sequuntur personam* having the full operation given to it by English law for the purpose of succession duties in the case of all personal assets of the domiciled decedent. The only authority at all in conflict with this view is *Woodruff v. Attorney-General for Ontario* (1908), A.C. 508. But the conflict is more apparent than real. The property there in question consisted of bonds and debentures of a foreign country which were at the date of their transfer and remained in the custody of a New York deposit company. The transmission of them was not by will or upon intestacy, but by instrument *inter vivos* which took effect

under the law of the State of New York. There was no succession or transmission by virtue of Ontario law. The ground on which the maxim *mobilia sequuntur personam* is applied in this case, therefore, did not exist in *Woodruff's* case."

The maxim *mobilia sequuntur personam* is applicable to debts due on mortgage of outside real property, where such debts form part of the estate of a domiciled decedent. This was the decision in *Lawson v. Commissioners of Inland Revenue* (1896), 2 I.R. 418; W.N. 145; in which it was held that duty was payable with respect to mortgages on property situate in Switzerland and Victoria to the country where the deceased had been domiciled at the time of his death.

*Re Fisher*, 7 O.W.N. 754.

This was an application by the Solicitor to the Treasury for Ontario under section 12 of the Succession Duty Act, R.S.O., 1914, Ch. 24, for an inquiry into the correctness of the inventory of the estate of Donald F. Fisher, deceased, alleging that the province was entitled to duty upon two mortgages held by the testator at the time of his death on real estate situate in British Columbia. The deceased was domiciled in Ontario at the time of his death. Surrogate Court Judge Winchester held that duty was payable in Ontario.

Section 8 of the Ontario Succession Duty Act, 1914, imposed taxation "in respect of any succession". In view of this wording in the Act, the tax cannot be regarded as a tax upon property such as that imposed by the Alberta legislation later considered by the Judicial Committee in the *Kerr* case.

*Smith v. Provincial Treasurer of Nova Scotia* (1919), 58 S.C.R. 570; 47 D.L.R. 108.

The Supreme Court of Nova Scotia gave judgment that certain bank shares were liable to succession duty in the Province of Nova Scotia on the ground that the share register determined the locality thereof. The judgment was upheld by the Supreme Court of Canada, not only on the ground



that the shares were locally situate in Nova Scotia, but also by reason of the application of the maxim *mobilia sequuntur personam*, the deceased, in his lifetime, having been domiciled in that province.

Davies, C.J., and Anglin, J., strongly supported the view that the maxim *mobilia sequuntur personam* embodied the principle applicable to the succession to property of domiciled decedents of any province of Canada for the purposes of succession and legacy duties, as distinct from probate and estate duties. The application of this doctrine, so far as it affected the law as it then stood in Nova Scotia, was also upheld by Idington, J., and Mignault, J.

It is thought, however, that the views expressed as to the applicability of the maxim in this case were erroneous, as the Nova Scotia Succession Duty Act, 1912, did not impose taxation upon or in respect of the succession. The tax was directly imposed upon property.

The law in British Columbia has been interpreted from time to time by the Courts of that province as imposing a tax upon personal property locally situate in the province, irrespective of the domicile of the deceased owner of such property, and, in other cases, as imposing a tax upon all movable or personal property of a domiciled decedent.

*In re Succession Duty Act, and Walker* (1922), 1 W.W.R. 803; 30 B.C.R. 549.

The deceased died domiciled in British Columbia bequeathing all his property to his son, who was named executor. His estate included certain Agreements for Sale of Land situate in the Province of Saskatchewan, and promissory notes made in Saskatchewan and payable by residents of that province. Hunter, C.J.B.C., held that succession duty was payable in respect of these Agreements and promissory notes under the Succession Duty Act, R.S.B.C., 1911, by virtue of the application of the maxim *mobilia sequuntur personam*.

*In re Succession Duty Act, In re Inverarity Estate* (1924), 1 W.W.R. 901.

The Crown claimed succession duty on all the estate of A. J. M. Inverarity, deceased, who died domiciled in British Columbia. The property situated outside the Province of British Columbia, consisted of shares in various companies in Shanghai, China, the Chartered Bank of India, Australia, and China, and shares held in navigation companies in England and China. The widow of the deceased applied to the Court by petition for a declaration that the assessment of duty be confined to the assets of the deceased locally situated within the Province of British Columbia. Gregory, J., dismissed the petition, and his judgment was upheld by the British Columbia Court of Appeal. The Court of Appeal held that the tax under the British Columbia Succession Duty Act, as applied to "movables" outside the province belonging to a person who died domiciled within the province, is a direct tax and *intra vires* of the Provincial Legislature.

*In re Parker* (1926), 1 D.L.R. 783; 36 B.C.R. 299.

In this case it was held by Hunter, C.J.B.C., that the situs of a debt wherever payable is the domicile of the deceased creditor for the purposes of succession duty, applying the maxim *mobilia sequuntur personam*.

*In re Littridge* (1927), 3 D.L.R. 250.

In holding that succession duty is payable on a gift *inter vivos* made within a year of death by a person domiciled at the time of death in British Columbia, Murphy, J., said:—

"The province has the power to impose succession duty on personal property locally situate outside its territory in the case of a decedent domiciled in British Columbia at the time of his death. Since the deceased parted with her interest in or control over the money (to the extent that she parted with it at all) by a grant or gift *inter vivos* within one year of her death, such action is, by section 5(c) of the Act inoperative to defeat the tax. The facts in *Woodruff v. Attorney-General of Ontario* (1908), A.C. 508, are altogether different from the facts here."

In all these British Columbia cases the statute under consideration imposed the tax directly upon property, and

not upon or in respect of the succession. This being so, the decisions must be regarded as having been overruled by the subsequent finding of the Privy Council in the *Kerr* case.

In *Attorney-General of British Columbia v. Wilson* (1926), 4 D.L.R. 139; affirming (1926), 1 D.L.R. 1008; it was held that under section 5 (1) (a) of the Succession Duty Act, 1924, personal property of a person dying abroad, but domiciled in British Columbia, which is locally situate abroad, is not taxable. This decision was arrived at by reason of the wording of the statute which confined the tax to the estates of persons dying in the province.

*Attorney-General of Ontario v. Baby* (1927), 1 D.L.R. 1105; 60 O.L.R. 1; affirming (1926), 3 D.L.R. 928; 59 O.L.R. 181.

In this case, the provisions of the Ontario Succession Duty Act in force in 1926 were under consideration. The Act imposed the tax "in respect of any succession, or on property passing," and, in precise language, defined what should be deemed to confer a "succession" within the meaning of the Act.

The domicile of R. A. Baby, deceased, had been in Windsor, Ontario, as was also the domicile of his wife, J. C. Baby. The deceased, although ordinarily resident in Windsor, was at the time of his death in the City of Detroit, Michigan, and his wife was with him there at that time. The total value of the assets of the deceased was \$875,154.62. Of this total, assets to the value of \$606,987.94 were situated in Windsor, Ontario, and the remainder valued at \$268,166.88 were located in Detroit, Michigan. The estate disputed liability to succession duty in respect to the succession to the property in Michigan but the claim of the Province of Ontario was upheld by Grant, J., whose decision was affirmed by the Ontario Supreme Court, Appellate Division.

In the course of his judgment, Grant, J., says:—

"In so far at least as the tax is sought to be imposed in respect of the succession, it comes within the class of impost known to the law as 'succession' or 'legacy' duty, as

distinct from 'estate' or 'probate' duty. As I read and interpret the various decisions bearing upon the subject, I find the law to be that the imposition of a duty upon a succession which took place within the province, even though with respect to personalty situated outside the limits of the province, is *intra vires* of the Provincial Legislature.

"My conclusion, therefore, is that sections 3 and 8 of the Succession Duty Act of Ontario are intended to and do impose a duty or tax upon the 'succession'; that such duty or tax is a legacy or succession duty as distinguished from an estate or probate duty; that the maxim *mobilia sequuntur personam* is properly applicable; that the deceased testator having been domiciled in the Province of Ontario, and his wife having also been domiciled and ordinarily resident within Ontario at the time of the death of her late husband, by force and virtue of the maxim, the personal property, although physically situate in Detroit, had an artificial or legal situs in Ontario; that the succession duty imposed by the statute extends to cover the same by reason of its transmission within Ontario and under Ontario law and the succession thereto by the defendant, J. C. Baby, in Ontario; and that the legislation is *intra vires* of the Legislature."

*Eric Beach Company, Ltd. v. Attorney-General of Ontario* (1930), 1 D.L.R. 859; affirming (1929), 2 D.L.R. 754; 63 O.L.R. 469; reversing (1928), 1 D.L.R. 739; 61 O.L.R. 507.

One F. V. E. Bardol died on 9th April, 1925, domiciled in and resident in Buffalo, in the United States of America. The property passing on his death included certain shares of the Eric Beach Company, Ltd., whose head office was in Ontario. Logie, J., held that no duty was payable in respect of these shares, holding that the tax imposed by the Ontario Succession Duty Act, R.S.O. 1914, ch. 24, was a succession or legacy duty, which could only be imposed by the country in which the deceased was domiciled.

This judgment was reversed by the Ontario Supreme Court, Appellate Division. Commenting on the nature of the taxation imposed, Hodgins, J.A., says:—

"It will be observed that in section 7 of the Act two classes of property are dealt with, namely:

"(1) All property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere;

"(2) All other property subject to succession duty upon a succession.

"On looking at section 3, which defined what a 'succession' is, it appears that a 'succession' is confined to the right or interest by virtue of such dispositions or devolutions of property as occur on the death of a person domiciled in Ontario, whereby any person becomes beneficially entitled thereto.

"The duty, therefore, which, judging by the title of the Act, may be denominated 'succession duty', is of two kinds. One is succession duty in the proper sense of that term, and the other approximates to an estate or probate duty."

The judgment of the Appellate Division of the Ontario Supreme Court was affirmed by the Privy Council, but no comment was made upon the accuracy or otherwise of the views expressed by Hodgins, J.A., regarding the nature of the tax.

By two decisions of the British Columbia Court of Appeal the Succession Duty Act of that province, R.S.B.C. 1924, ch. 244, was held to be *ultra vires* of the Provincial Legislature as imposing a tax directly upon outside property, the taxation being regarded as in the same category with the Alberta taxation which had been condemned by the Judicial Committee in the *Kerr* case. See *Attorney-General for British Columbia v. Col*, 48 B.C.R. 171; *Godson v. Attorney-General for British Columbia* (1935), 1 D.L.R. 92.

**(c) Property of Which the Deceased Was Competent to Dispose.**

Property of which the deceased was at the time of his death competent to dispose is specially made liable to succession duty by the statutes of all the provinces, except that of Quebec.

This class of property is mentioned in subsection (1) (a) of section 2 of the English Finance Act, 1894, and the definition thereof contained in section 22 (2) (a) of that Act has been embodied in practically the same phraseology in the Ontario Succession Duty Act. In the Ontario Act, the definition is as follows:—

- (c) any property of which the person dying was at the time of his death competent to dispose; and a person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property as he thinks fit, whether the power is exercisable by instrument inter vivos or by will or both, including the powers exercisable by a tenant in tail whether in possession or not, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself or as mortgagee; provided that a disposition taking effect out of the interest of the person so dying shall be deemed to have been made by him whether concurrence of any other person was or was not required and provided further that money which a person has a general power to charge on property shall be deemed to be property of which he has the power to dispose;

A similar definition is contained in the statutes of Nova Scotia, Prince Edward Island, Alberta, Saskatchewan, Manitoba, and the Yukon Territory, except that in some of these statutes certain words have been omitted from the definition.

In the Alberta and Saskatchewan Acts the words omitted are "including the powers exercisable by a tenant in tail whether in possession or not". In the Manitoba and Yukon Territory Acts the words omitted are "including the powers

exercisable by a tenant in tail whether in possession or not, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself or as mortgagee."

The definition contained in the statutes of New Brunswick and British Columbia refers not only to general powers of appointment, but also to limited powers enabling a person to dispose of property for the benefit of his children or some of them.

A person under some disability, such as infancy or lunacy, which prevents him for the time being from dealing with the property as he wishes, is said to be not *sui juris*. Accordingly, if a deceased infant or lunatic would have been able to dispose of property in his lifetime, apart from his disability, succession duty is payable.

The following are examples of property of which a person is competent to dispose:—

- (1) The deceased's free real and personal estate;
- (2) The deceased's severable share of property of which he was a joint tenant;
- (3) Property over which the deceased had a general or absolute power of appointment by deed or will;
- (4) Money which the deceased had a general power to charge on property;
- (5) Entailed property;
- (6) Revocable gifts;
- (7) Posthumous acquisitions; and
- (8) Policies of insurance.

The subject of joint property is considered under a separate heading of this chapter.

#### **Powers of Appointment.**

The words "as he thinks fit" in the definition relate only to the choice of objects, and not to the form of disposal. A power may therefore be a general power for this purpose, notwithstanding some special reference to the power is

required in the instrument by which it is exercised. *Phillips v. Cayley* (1889), 43 Ch. D. 222; 50 L.J. Ch. 177; 62 L.T. 86; 38 W.R. 241.

If a life tenant is authorized to appropriate such part of the capital as he thinks fit, he is competent to dispose of the whole capital. *Re Richards, Oglow v. Richards* (1902), 1 Ch. 76; 71 L.J. Ch. 66; 88 L.T. 452; 50 W.R. 90.

If a power is exercisable by one person with the consent of another, the power is not general if the consent required relates to the selection of objects. It is otherwise, however, if the consent merely relates to the act of exercising the power. *Re Watts, Coffey v. Watts* (1931), 2 Ch. 302; 101 L.J. Ch. 353; 145 L.T. 520; *Re Phillips, Lawrence v. Huxtable* (1931), 1 Ch. 347; 100 L.T. Ch. 65; 144 L.T. 178.

The liability to duty does not depend upon the power being actually exercised or the donee taking in default of appointment.

*Attorney-General v. Stuart*, 2 O.L.R. 403.

This was a special case stated for the opinion of the Court in an action by the Attorney-General for Ontario against Sir Edward Andrew Stuart, of London, England. Sir Charles James Stuart, the brother of the defendant, died on the 25th day of February, 1901, leaving a will and four codicils. The bulk of the estate was in England, where he was domiciled, and amounted to £640,000. The deceased also possessed property in the Province of Ontario, consisting of land valued at \$51,475.00. The testator, by his will dated 6th day of January, 1875, left the whole of his residuary estate to executors and trustees, with a direction to pay the income thereof to his brother for life. By the third codicil, dated the 3rd day of January, 1890, he directed that the trustees should pay the whole income to his sister, Mary Catherine Stuart, during her life, and gave her a general power of appointment to dispose of his estate by will, and directed that in default of appointment the provisions of the original will should take effect. By the last codicil, dated the 17th day of July, 1895, he made his sister



the sole executrix and trustee under the will and codicils. She died five days after the testator, and left a will dated the 2nd day of September, 1873, by which she gave all her estate to Sir Charles, and in case of his death without issue (which was the event which happened), she gave it to the defendant. The will of Sir Charles was not proved before her death, and in England the defendant obtained letters of administration to the estates of both his brother and sister with the wills annexed.

It was held that, having regard to the provisions of clause (2) of section 4 of the Succession Duty Act, R.S.O. 1897, ch. 24 (inserted by section 11 of 62 Vict., ch. 9), the lands in Ontario were subject to two duties, as having devolved under both wills.

By the statutes of Ontario, New Brunswick, Prince Edward Island, Manitoba, Saskatchewan, Alberta, and the Yukon Territory, it is provided that property passing on the death in respect of which a person is given a general power to appoint shall be liable to duty, and the duty thereon shall be payable in the same manner and at the same time as if the property itself had been given to the donee of the power. As a result of this provision property which is the subject-matter of a general power of appointment is subject in these provinces to taxation on two occasions, namely, (a) on the death of the creator of the power; and (b) on the death of the donee of the power.

There is no similar provision in the statutes of the other provinces. On the death of the creator of the power of appointment, therefore, the claim for duty in these last-mentioned provinces is confined to whatever interest in the property is given to the donee of the power personally and the *corpus* of the property is not liable to taxation until the actual exercise of the power.

Under the early provincial succession duty legislation it has been held that the rate of duty chargeable on the property passing to the appointee on the exercise of a power of appointment is determined by the relationship of the appointee to the original creator of the power.

*Attorney-General v. Parker*, 31 N.S.R. 202.

Martin P. Black by his will directed his trustees to invest a portion of his estate and pay the income arising therefrom to his brother, Charles, and, in their discretion, to pay Charles a portion of the principal, and, after the death of Charles, to pay the principal remaining to such uses and purposes as Charles should by deed or will appoint.

Martin P. Black died on the 19th April, 1891, some four years before the passage of the Nova Scotia Succession Duty Act, 1895. His brother Charles died on the 30th December, 1897, after the passage of that Act, having exercised his power of appointment by will dated the 3rd June, 1897. It was held that the fund in question did not pass, within the meaning of the Act, by the exercise of the power of appointment by Charles, the appointees taking under the instrument creating the power and not by virtue of the power itself. It was further held that section 7 of the *Nova Scotia Succession Duty Act, 1895*, must be considered as applying only to deaths occurring after the passage of that Act.

The decision in *Attorney-General v. Parker* does not apply to the present legislation in Nova Scotia or in the other provinces for the following reasons, namely:—

- (a) The Nova Scotia Succession Duty Act, 1895, does not contain any provision that the property passing shall be deemed to include property of which a deceased was competent to dispose;
- (b) There is no provision in that Act similar to that contained in the provincial statutes of Ontario, Saskatchewan and Prince Edward Island that property passing on the death in respect of which a person was given a general power to appoint shall be liable to duty, and that the duty thereon shall be payable in the same manner and at the same time as if the property itself had been given to the donee of the power.

Under the present law in Nova Scotia property which passes on the death includes property of which the deceased was at the time of his death competent to dispose and the rate or rates of duty on such property is or are determined by the relationship of the beneficiaries to the deceased person on whose death it passes.

Where the power of appointment is limited, enabling the donee only to appoint in favour of certain specified persons, only one duty is payable. If the power were originally created by will, a gift in exercise of it, however, made is a legacy under that will and not under any other. See *Attorney-General v. Pickard*, 6 M. & W. 348. The same principle applies in the case of a limited power exercised by deed in the lifetime of the donee. *Sweeting v. Sweeting*, 22 L.J. 441. Duty is accordingly only payable in the case of limited powers of appointment under the will of the person creating the power according to the relationship to him of the appointee, or, if the power is not exercised, according to the relationship of the persons entitled in default of appointment.

The statutes of New Brunswick and British Columbia provide that a person shall be deemed competent to dispose of property not only if he has a general power of appointment, but also if he has a limited power enabling him to dispose of same for the benefit of his children or some of them. The effect of this provision is apparently to make the duty chargeable in such a case depend upon the relationship of the ultimate beneficiary to the donee of the power, either upon the latter's exercise of the power or his failure to exercise it.

*Provincial Secretary-Treasurer of New Brunswick v. Schofield* (1923), 2 D.L.R. 1144; 50 N.B.R. 392.

In this case, Henry Gilbert by his will dated August 22, 1898, appointed his wife Lucy A. Gilbert and his sister Elizabeth Wilson the executors thereof. He bequeathed all his personal estate to his wife and devised all his real estate unto his executors in trust to pay the net rents and

profits thereof after the payment of certain charges to his said wife for and during the term of her life, and after her death he devised the said real estate to his sister Elizabeth and her assigns for her life, and after her death to such person or persons as the said Elizabeth Wilson should by will or codicil appoint.

The Court held that the power of appointment being general and absolute, and not a power to appoint for the benefit of a person or persons named or described, the property devised by the sister in pursuance of the power of appointment was under the Succession Duty Act, 1915, sections 9 and 10, for succession duty purposes to be considered as part of the estate of the sister to whom the power was given and not as a part of the estate of the brother.

*In re Norman*, 3 M.P.R. 571.

By a marriage settlement dated April 13, 1874, between Luke Norman, Elizabeth Edwards, John Holden and Ward C. Drury, certain personal property was assigned to the said Holden and Drury upon certain trusts.

The settlement directed the trustees to hold the property upon trust, *inter alia*, to pay \$1,000.00 annually to Elizabeth Norman during her life and the balance of the income of the trust property to Luke Norman during his life, and if the said Elizabeth Norman survived the said Luke Norman, then in trust for her absolutely, but if the said Luke Norman survived the said Elizabeth Norman then in trust for such persons as the said Elizabeth Norman should by deed or will appoint, and in default of appointment to the persons who would be entitled under the statute of distribution to the said property had the said Elizabeth Norman died intestate and unmarried.

Elizabeth Norman died before her husband, in December A.D. 1924, while her husband died on 8th June, 1925.

Under the power of appointment contained in the marriage settlement, Elizabeth Norman, by her last will directed the trustees to pay certain legacies and then to pay the balance of the estate to her executors upon certain trusts. At

the time of their respective deaths Luke Norman and Elizabeth Norman were domiciled in England. The trust property was situated in New Brunswick.

It was held, following the decision in *Provincial-Treasurer v. Schofield*, *supra*, that the property was liable to succession duty.

### General Power to Charge.

A power to charge on land such sums as the donee of the power thinks fit enables him to direct the land to be sold and to appoint the whole of the proceeds. *Long v. Long* (1800), 5 Ves. 445; 31 E.R. 674, L.C.

### Posthumous Acquisitions.

Section 33 of the English Wills Act, 1837 (7 Will 4 and 1 Vict., ch. 26) has been incorporated in certain of the provincial statutes relating to wills. By this section, a gift of real or personal property to a child or other issue of the testator, will not lapse if any issue of the devisee or legatee survive the testator. In such a case, succession duty is payable on the death of both parent and child.

*Re John Scott, jun. (deceased)*, (1901), 1 K.B. 228; 70 L.J.Q.B. 66; 83 L.T. 613.

John Scott, senior, devised real property to his son, John Scott, junior, who died on the 22nd January, 1899, in his father's lifetime, leaving a daughter who was living at his father's death. The son devised his residuary estate to trustees. This devise included the property devised by the father's will, and took effect by virtue of the Wills Act, 1837, section 33. The father died on the 12th May, 1899, and estate duty was paid on all the property which passed on his death, including that devised to his son. Estate duty was claimed on the property devised by the son to the trustees. It was held by the Court of Appeal that by section 33 of the Wills Act, 1837, the bequest by the father to the son took effect as if the son had died immediately after the father and was therefore "competent to dispose" of the property within the meaning of section 2(1) (a) of the

Finance Act, 1894, and estate duty was payable on the death of the son as well as on the death of the father.

The property should be valued as at the time when it accrues.

The above section of the Wills Act does not apply to cases where the testator has made a provision in his will against lapse. *Lord Advocate v. Bogle* (1894), A.C. 63; 63 L.J.P.C. 85; 70 L.T. 533.

### Policies of Insurance.

The moneys payable under policies of insurance, if not otherwise made subject to taxation under a succession duty statute, may nevertheless be liable to duty as property of which the deceased was competent to dispose.

*In re Estate J. D. Byrne, deceased*, 43 B.C.R. 396.

This was an appeal from the order of Gregory, J., declaring that the net amounts payable under five insurance policies on the life of James Dillon Byrne, deceased, were not hable to succession duty under the British Columbia Act then in force. The deceased died in California on December 17, 1929. At the time of his death he had five life insurance policies, one in the Catholic Mutual Benefit Association for \$2,000.00, and four in the Canada Life Assurance Company aggregating \$10,000.00. The net amount payable on the five policies at the time of his death was \$8,495.10. The original beneficiary under said policies was the deceased's wife, but as she predeceased him, he then appointed his sister-in-law, Kate Currie Reardon, sole beneficiary under the said policies.

It was contended that the insurance policies were not taxable for the reason that under the statute it was only what was included in the deceased's estate at the time of his death that was taxable.

Macdonald, C.J.B.C., held that the policies were taxable pursuant to and by virtue of section 5(1) of the Succession Duty Act, 1924, providing that the properties subject to taxation should include any property of which a person

dying after the 31st August, 1900, was at the time of his death competent to dispose. The said insurance moneys were subject to be disposed of, notwithstanding the appointment of them to the sister-in-law of the deceased, as he might think fit up to the very moment of his death, and were therefore subject to duty.

**(d) Donationes Mortis Causa.**

The provision contained in most of the provincial succession duty enactments subjecting to taxation property taken as *donatio mortis causa* is copied from section 38 of the English Customs and Inland Revenue Act, 1881 (44 and 45 Vict., ch. 12).

A *donatio mortis causa* is a gift of personal estate made by a person in contemplation of death, only to take effect if the donor dies of his then sickness.

In order to constitute a valid *donatio mortis causa*, the following requirements are essential:—

- (a) The gift must be in contemplation of the expected death of the donor;
- (b) There must be delivery of the gift, either actual or constructive, in the lifetime of the donor;
- (c) The gift must be conditional, to take effect only on the death of the donor from the sickness then affecting him.

It is not every subject of property that can be given as a *donatio mortis causa*. The following cannot be so given:—

- (1) Certificates of railway stock. *Moore v. Moore*, L.R. 18 Eq. 474;
- (2) Real and leasehold property;
- (3) An I.O.U. *Duckworth v. Lee* (1899), 1 I.R. 405;
- (4) A cheque of the donor presented after death where the account is overdrawn. *Re Beaumont* (1902), 1 Ch. 889.

On the other hand, the following have been held capable of being so given:—

- (1) Chattels which can be transferred by delivery;
- (2) Promissory notes, except those of the donor. *Veal v. Veal*, 27 Beav. 303;
- (3) Bills of exchange. *In re Mead*; *Austin v. Mead*, 15 Ch. D. 651;
- (4) Post office savings bank book. *In re Weston* (1902), 1 Ch. 680;
- (5) Cheques of a third person. *In re Leaper*; *Blythe v. Atkinson* (1916), 1 Ch. 579;
- (6) Banknotes. *Miller v. Miller*, 3 P. Wms. 357;
- (7) Bonds. *Snellgrove v. Bailey*, 3 Atk. 214;
- (8) Assurance policies. *Amuss v. Witt*, 33 Bear. 619;
- (9) Bank deposit receipts. *Cassidy v. Belfast Banking Co.*, 22 L.R. Ir. 68.

Where a *donatio mortis causa* is made to satisfy a contractual obligation, it is not subject to duty.

*Attorney-General for Ontario v. Brown*, 5 O.L.R. 167.

The aggregate value of the estate of an intestate was \$12,877.00, of which property to the value of \$7,540.00 passed to the hands of his niece by virtue of an agreement between them, given effect to by a *donatio mortis causa*. By this agreement the deceased and his niece were to combine their chattel property and their personal energies in the working of the farm owned by the deceased, and its belongings, upon a mutual obligation that the survivor should become possessed of the whole personalty resulting from this co-operation of goods and labour. It was held that the \$7,540.00 was not dutiable under the Ontario Succession Duty Act, R.S.O., 1897, ch. 24, and amendments, the transfer from the intestate to his niece not being a voluntary one, but made in pursuance of a contractual obligation for value.

#### (e) Gifts Inter Vivos.

Where a person makes a gift in his lifetime of part of his property to some other person, such a disposition is



termed a gift *inter vivos*. The liability of such gifts to succession duty depends upon a variety of considerations. The subject may be considered under the following headings:—

1. Property voluntarily transferred in contemplation of the death of the donor.
2. Gifts made within a limited period of the donor's death.
3. Gifts of property, where there is a reservation of benefit to the donor.
4. Transfers for valuable consideration.

#### **Transfers in Contemplation of Death.**

There is a considerable degree of uniformity in the statute law of the provinces in the provision subjecting to taxation transfers of property made in contemplation of the death of the transferor.

The Nova Scotia Succession Duty Act mentions this class of gifts in the following terms:—

"Property voluntarily transferred by deed, grant, bargain, sale or gift made in general contemplation of the death of the grantor, bargainor, vendor or donor, and with or without regard to the imminence of such death, or made or intended to take effect in possession or enjoyment after such death to any person in trust or otherwise, or the effect of which is that any person becomes beneficially entitled in possession or expectancy to such property."

A similar reference to voluntary transfers in contemplation of death is contained in the other provincial statutes except those in force in the Provinces of Ontario and Quebec. The New Brunswick Act provides that any property transferred in the lifetime of the deceased, voluntarily or without adequate consideration, shall be deemed *prima facie* to have been made in contemplation of his death.

The Ontario Act does not make special mention of voluntary transfers in contemplation of death, but provides in general terms for the taxation of dispositions of property made in the lifetime of deceased persons. By section 6b of

the Act it is provided that a disposition shall be deemed to include, *inter alia*, any voluntary transfer, payment, gift, release, surrender, waiver, mailing, dispatching or sending, of any property or any benefit or interest in any property by the deceased person or by his agent or nominee,

(a) by way of declaration of trust, creation of trust, or otherwise, or

(b) through the instrumentality or agency of any company, partnership or business in which either the deceased person or such other person was either alone or in combination with any member of his family, beneficially interested, directly or indirectly, to the extent of more than fifty per centum, or

(c) by any other method whatsoever, whereby any property or benefit or interest in any property passes, directly or indirectly, from the deceased person during his lifetime to any other person.

*In re George Roach*, 10 O.L.R. 208, Street, J., comments on the expression "in contemplation of death" as follows: "I think those words as they are here used must be held to refer to an actually impending death, and not to a case in which death was an event which was not expected to take place immediately or within a measured time."

In a Wisconsin case (*State v. Pabst*, 139 Wis. 561, 590) the words "in contemplation of death" have been thus defined: "It is manifest the words were intended to cover transfers by parties who were prompted to make them by reason of the expectation of death, and which, in view of that event, accomplish transfers of the property of decedents in the nature of a testamentary disposition. It is therefore obvious that they are not used as referring to that expectation of death generally entertained by every person. The words are evidently intended to refer to an expectation which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it upon those whom they regard as entitled to their bounty."

It follows that in order to prove that property has been transferred in contemplation of death the Crown must adduce evidence to show some bodily or mental condition as would indicate that the transferor regarded his death as impending prior to the execution of the transfer.

Transfers of property which enable the transferee to escape payment of succession duty do not necessarily mean that such transfers were made in contemplation of death.

*Receiver-General of New Brunswick v. Schofield*, 35 N.B.R. 67.

In this case it was claimed on behalf of the Receiver-General that section 5 of 59 Vict., ch. 42 included, not only voluntary transfers of property made in contemplation of death or to save payment of the duty, but all transfers of every kind which enable the transferee to escape payment of the duty. The section in question provided as follows:—

“Save as aforesaid all property, whether situate in this province or elsewhere, other than property being in the United Kingdom of Great Britain and Ireland, and subject to duty, whether the deceased person owning or entitled thereto had a fixed place of abode in or without this province at the time of his death, passing either by will or intestacy, or any interest therein or income therefrom, which shall be voluntarily transferred in contemplation of the death of the grantor or bargainor, or made or intended to take effect, in possession or enjoyment after his death to any person in trust or otherwise, or by reason whereof any person shall become beneficially entitled in possession or expectancy to any property or income thereof, which shall have been or shall be voluntarily transferred, or transferred without adequate consideration, for the purpose of evading the payment of succession duty to the Crown, or any transfer the effect of which shall have been or shall be to enable the transferee to escape payment of duty to the Crown shall be subject to a succession duty to be paid for the use of the province.”

The facts of the case were that a number of shares of the Turnbull Real Estate Company were transferred by the

testator in August, 1892, to certain members of his family, not in contemplation of his death or with any intention of evading payment of duty. The deceased died on 26th June, 1899. It was held that the shares in question were not liable to succession duty.

The advanced age of a donor is not alone sufficient to establish that a gift has been made in contemplation of death.

*Matter of Mills*, 172 App. Div. 530; 158 Supp. 1100; affirming 219 N.Y. 642.

Gifts were made by the deceased to his children when he was 84 years of age, and in failing health. He died ten days after the gifts were made, but it was held that they were not taxable.

But advanced age, when taken in conjunction with other circumstances, is of importance in determining whether a gift has been made in contemplation of death.

#### Gifts Made Within a Limited Period of Donor's Death.

Section 38 of the Customs and Inland Revenue Act (England) 1881, (45 & 45 Vict., ch. 12), as amended in 1889, renders liable to account stamp duty property taken under a voluntary disposition, made by any person dying on or after the first day of June, 1881, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise which shall not have been *bona fide* made twelve months before the death of the deceased.

By section 2 (1) (c) of the English Finance Act, 1894, the above provision, omitting the word "voluntary," was made applicable to estate duty.

A similar provision has been embodied in most of the provincial enactments with a view to taxing gifts made within a limited time of the donor's death, irrespective of other considerations.

The British Columbia statute makes provision for the taxation of gifts made within two years of the donor's death. In the provinces of Alberta, Nova Scotia, and Prince

Edward Island, the period is three years, and in Quebec, New Brunswick, Manitoba and the Yukon Territory, five years. The Ontario Act taxes every disposition of any property (other than realty situate outside Ontario) made within Ontario by any person during his lifetime on or after the 1st day of July, 1892. The Saskatchewan Act makes provision for the taxation of gifts made since 21st November, 1903.

### Gifts With Reservation.

Gifts made at any time during the donor's life may be liable to duty. Thus, it is provided by the Statutes of Manitoba, Saskatchewan, Prince Edward Island, and the Yukon Territory, that the property passing on the death of the deceased shall be deemed to include, for the purposes of succession duty,—

“Property taken under a grant or gift whenever made, of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the grant or gift, and thenceforward retained to the entire exclusion of the donor as well as of any benefit to him, whether voluntary or by contract.”

This class of gifts is described in the Nova Scotia Act as follows:

“Property taken under any gift whether by way of transfer, delivery, declaration of trust or otherwise, whenever made, of which property actual and *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon such gift, and thenceforward retained by such donee to the entire exclusion of the donor or of any benefit or advantage to him or of any control by him whether such benefit, advantage, or control is voluntary or by contract or otherwise. In this clause possession and enjoyment of any property shall not be deemed to have been assumed by the donee, unless the donee has assumed the said possession and enjoyment himself and not through the intervention or interposition of any agent, trustee, or third person.”

The statutes of New Brunswick, Alberta and British Columbia, contain a provision similar to that in the Manitoba Act, except that the word "voluntary" is omitted in the concluding sentence, thereby making it an exact copy of the latter part of subsection 2 of section 38 of the Customs and Inland Revenue Act (England) 1881, (44 & 45 Vict., ch. 12), as amended in 1889, which was subsequently embodied in section 2 (1) (c) of the English Finance Act, 1894.

The following cases illustrate when duty is properly chargeable under this provision:—

*Att'y-Gen. v. Worrall* (1895), 1 Q.B. 99; 64 L.J.Q.B. 141; 71 L.T. 807.

Certain property was subject to a mortgage for £23,925. The mortgagee instituted foreclosure proceedings, but before the decree for foreclosure had been made absolute, the mortgagee's son purchased the equity of redemption from the mortgagors for £525. At the same time, the mortgagee released his son from the mortgage debt in consideration of a covenant by the latter to pay his father during his life the yearly sum of £735. It was held by the Court of Appeal that the transaction was equivalent to a gift of the mortgage money to the son, and that such gift was liable to account stamp duty on the father's death.

*Crossman v. The Queen* (1886), 18 Q.B.D. 256; 56 L.J. Q.B. 241; 55 L.T. 848.

Pursuant to a power in certain partnership articles, Robert Crossman executed a deed on 12th July, 1883, whereby he appointed shares in the partnership to his two sons as from 1st October, 1883, or the death of Robert Crossman, which should first happen. In consideration of these appointments, the sons executed a deed covenanting to pay Robert Crossman, as from 1st October, 1883, interest at four per cent. during his life on the value of the appointed shares. The sons also covenanted to pay certain other annuities. Robert Crossman died one week after the execu-

tion of the deed. It was held that the transfer to the sons was a gift, with a reservation of benefit to Robert Crossman to the extent of a life interest.

*Re William Clarke, deceased*, 40 Ir. L.T.R. 117.

The deceased in his lifetime was the owner of a business. He took his two sons into partnership in the year 1895 upon the following terms, namely: (a) The sons to bring in no capital, but to devote their whole time to the business; (b) Each of the sons to receive one-fourth of the profits; (c) On the father's death the sons were to be entitled to the partnership property; (d) The father was to be entitled to charge the property with £6,000.

In the year 1900 the entire business was assigned to the sons, and the father retained power to charge the property with £12,000.

The father died on 10th December, 1904, and estate duty was claimed on the entire value of the partnership assets. The King's Bench, Ireland, upheld the claim, on the ground that a benefit had been reserved by the deeds to the donor within the meaning of section 11 of the Customs and Inland Revenue Act, 1889, and incorporated in section 2 (1) (c) of the Finance Act.

*Lord Advocate v. Wilson* (1894), 21 S.S.C. 4th series, 997; 31 S.L.R. 819; W.N. (1896), 118.

The whole stock-in-trade and goodwill of his business had been transferred by the deceased in his lifetime to his three sons, who thereupon formed a partnership. The sons agreed to pay an annuity equivalent to 5 per cent. on the value of the stock to their father for life, and then to their mother for life. It was held that a benefit had been reserved, and that account stamp duty was payable.

*Atty.-Gen. v. Earl Grey* (1898), 1 Q.B. 318; 2 Q.B. 534; (1900), A.C. 24; 67 L.J.Q.B. 947; 69 L.J.Q.B. 308; 79 L.T. 235; 82 L.T. 62; 47 W.R. 37; 48 W.R. 383.

Henry Earl Grey, by an indenture dated 19th October, 1885, conveyed his real and personal estate to his nephew.

Albert Hy. G. Grey, subject to the following reservations and conditions:—

1. The nephew to pay Henry Earl Grey £4,000 per annum as a rent-charge.

2. Henry Earl Grey to have the right to occupy the Mansion House at Howick for his life.

3. The nephew to pay the funeral and testamentary expenses of Henry Earl Grey to the extent of the property conveyed.

4. In the event (which did not happen) of the nephew predeceasing Henry Earl Grey, the latter was to have a power of revocation.

In September, 1894, the rent-charge and power of revocation were released, in consideration of £5,000, paid by the nephew.

Henry Earl Grey died on 9th October, 1894. The House of Lords held that estate duty was payable upon all the property comprised in the indenture of 19th October, 1885, on the ground that benefits had been reserved to the donor. The average annual net income of the property comprised in said indenture largely exceeded the rent charge.

*Atty.-Gen. v. Johnson* (1902), 1 K.B. 416; 71 L.J.K.B. 187; 86 L.T. 296; (1903), 1 K.B. 617; 72 L.J.K.B. 323; 88 L.T. 445.

In the year 1889 C. T. M. Burton gave the sum of £500 to the London Missionary Society, subject to an arrangement whereby the Society was to pay an annuity of £25 to him for life, and on his death to his widow for life. It was held by the Court of Appeal that the transaction was not a *bona fide* sale, and that estate duty was payable on the full sum of £500.

*Lord Advocate v. McTaggart Stewart* (1906), 13 Sc. L.T.R. 945; 43 Sc. L.R. 465.

Mrs. Ommanney McTaggart, heiress of entail in possession, seven years prior to her death, propelled the estate to her daughter, the next heir. She also gave her whole



personal estate to her daughter, including the furniture in the house. After the transfer, she continued to live in the house, and to occupy a bedroom. It was held that duty was not payable on the donor's death, as the conveyance had been completed in every way and the donor could not subsequently enforce the right to use the furniture or reside in the house.

*Atty.-Gen. v. Scccombe* (1911), 2 K.B. 688; 105 L.T. 18; 80 L.J.K.B. 913.

The deceased had transferred his property to his great-nephew, in consideration of natural love and affection, retaining an annuity of £15 charged on land which belonged to the donee. After the execution of the deed, he continued to live in the house (part of the property transferred), and was maintained by the donee until his death. There was no contract that, in consideration of the gift, the donor should be allowed to reside in the house and be maintained by the donee. It was held that there was an "entire exclusion of the donor, of any benefit to him by contract or otherwise," from the possession and enjoyment of the property within the meaning of section 11 of the Customs and Inland Revenue Act, 1889, and that therefore estate duty was not payable under section 2 (1) (c) of the Finance Act, 1894. It was also held that the words "or otherwise" in section 11(1) of the Customs and Inland Revenue Act, 1889, must be construed as *cjusdem generis* with "contract" and refer to an enforceable agreement.

*In re George Roach*, 10 O.L.R. 208.

This was an appeal to Street, J., in Chambers, by the Provincial Treasurer of the Province of Ontario from a judgment of the Surrogate Court of the County of Wentworth, Ontario, under section 9 of the Succession Duty Act, R.S.O., 1897, ch. 24.

The testator had, more than a year before his death, and while in comparatively good health, conveyed his homestead to his two daughters in fee, the conveyance being at once registered. No change of possession, however, took place, the testator continuing to live in the house until his death.

It was held that the transaction was subject to succession duty as coming within subsection (c) of section 4 of the statute, providing for the taxation of "property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him, by contract or otherwise."

It is noteworthy that the judgment delivered in this case is at variance with the finding of Hamilton, J., in the later case of *Att'y.-Gen. v. Seccombe*, based upon a similar provision in the English Customs and Inland Revenue Act, 1889.

The provision in the Ontario Act, however, was afterwards amended to include voluntary reservations of benefit, as well as those by contract.

*Attorney-General of Alberta v. Cowan* (1926), 1 D.L.R. 29; S.C.R. 142; reversing (1925), 2 D.L.R. 647; 21 A.L.R. 241.

Ten years before his death the deceased purchased debentures of the Town of Camrose, Alberta, to the amount of \$20,000. He deposited the debentures in the Camrose branch of the Canadian Bank of Commerce, and on the 21st November, 1913, executed a declaration of trust whereby he declared that he held the debentures in trust for four of his children named therein and deposited the declaration with the bank, where they remained until his death. He never received or attempted to take any benefit from the debentures, and there was no evidence of any scheme or reservation whereby he retained any beneficial interest. No part of the income was paid to the beneficiaries, but the trustee invested it in trust in the same bank, where it accumulated until he died. The beneficiaries were, with one exception, infants at the time of the declaration.

It was held by the Supreme Court of Canada, reversing the judgment of the Alberta Court of Appeal, that although the possession by the deceased of the debentures was that of his *cestui que trustent* nevertheless there was not an assumption of possession by the beneficiary sufficient to take

the property out of section 6(b) of the Alberta Succession Duties Act, R.S.A. 1922, ch. 28, and the property was accordingly liable to duty.

*Re Denne, Fowkes v. Minister of Finance* (1927), 2 D.L.R. 717; 38 B.C.R. 395.

In this case it was held by the British Columbia Court of Appeal that to escape liability for duty there must be a *bona fide* transfer of the possession and enjoyment of property within the statutory period prescribed before death, and this is not fulfilled by a transfer of the principal of a fund without the dividends.

The Crown sought to charge duty on certain personal property which had been transferred by the deceased during his lifetime to his wife, consisting of stocks and bonds. The widow filed an affidavit to the effect that she became engaged to the deceased on June 1, 1923, and they were married on the 23rd of the same month. It was further alleged that shortly after the engagement and before the marriage the deceased informed her that he was going to settle on her the stocks and bonds in question. This was carried out some time in August through Lloyd's Bank, Ltd., in London, England, where the securities were being held on behalf of the deceased. The wife signed an authority to the bank in these words:—"I hereby request and authorize you to credit the dividends and interest from time to time falling due, and becoming payable on the stocks and shares registered in my name to the account of Mr. Cecil Gordon Denne, with yourselves."

The Crown contended that this was not a gift of property of which *bona fide* possession and enjoyment was immediately assumed by the donee, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. The contention was upheld.

#### Transfers for Valuable Consideration.

The statutes of New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan, make provision for the

taxation of property transferred for valuable consideration, to the extent, if any, to which the value of the property transferred exceeds that of the consideration paid.

The Ontario Act provides that the dispositions of property subject to duty shall include the transfer of, or the agreement to transfer any property by the deceased, for partial consideration in money or money's worth for the deceased's own use and benefit to the extent to which the value of the property so transferred or agreed to be transferred exceeds the value of such consideration.

These provisions are similar to that contained in subsection (2) of section 3 of the English Finance Act, 1894, as follows:—

“(2) Where any purchase was made or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty.”

By way of illustrating the effect of this provision, reference may be made to the decision in *Re Bateman* (1925), 2 K.B. 429; 95 L.J.K.B. 199; 134 L.T. 153. The deceased, in this case, in consideration of an immediate payment by his son, settled certain furniture on herself for life with remainder to him. It was found that the payment represented four-fifths of the value of the reversion at the time of the transaction, and it was held that duty was consequently payable on one-fifth of the value of the furniture at the death.

#### **Gifts in Consideration of Marriage.**

In the Province of Quebec gifts in consideration of marriage were formerly exempt from taxation but this exemption was repealed in the year 1934.

It has been held that a gift in consideration of marriage falls within section 2 (1) (c) of the English Finance Act, 1894. This provision has been embodied in most of the pro-

vincial enactments, and it would appear that under these enactments gifts in consideration of marriage are liable to duty.

*Att'y-Gen. v. Holden* (1903), 1 K.B. 832; 72 L.J.K.B. 420; 88 L.T. 829.

Herbert B. Paget, whose daughter was about to marry Wilfred M. Holden, agreed to settle £20,000 on the intended wife, on condition that Henry Holden, father of the intended husband, would give £10,000 to his son. The settlement of the £20,000 was carried out by a marriage settlement dated 27th January, 1900. Henry Holden gave his son £10,000 on the 2nd January, 1900, and died on the 1st February, 1900. It was held that estate duty was payable on the £10,000 under section 2 (1) (c) of the English Finance Act, 1894, as a gift from the deceased.

A settlement in consideration of the settlor's own marriage is not a gift for succession duty purposes unless special provision is made subjecting it to taxation.

*Attorney-General of Ontario v. Perry* (1934), 4 D.L.R. 65; affirming (1933), 3 D.L.R. 255; O.R. 617; reversing (1933), 1 D.L.R. 647; O.R. 218.

By a deed of June 23, 1903, the late Cawthra Mulock agreed that upon his contemplated marriage with Adele Baldwin Falconbridge he would transfer to certain trustees money, or securities for money, amounting to \$250,000.00. The marriage took place, and the transfer was made. Mr. Mulock died in December, 1918, his widow and issue of the marriage surviving. The Attorney-General of Ontario claimed that the estate of the deceased was as liable to taxation under the Succession Duty Act as if the \$250,000.00 still formed part of the estate.

It was held by the Court of Appeal that the transaction did not constitute a gift within the meaning of section 7 (2) (b) of the Ontario Succession Duty Act, R.S.O. 1914, ch. 24, and was not subject to duty. This decision was affirmed by the Privy Council.

By section 6b of the present Ontario Act it is provided that a disposition of any property by any person, during his lifetime, shall be deemed to include, *inter alia*, the transfer to or settlement on, or the agreement for such transfer to or settlement on, any person or persons by the deceased, in consideration of marriage.

A similar provision is contained in the Saskatchewan Act.

### Gifts of Foreign Property.

As has already been pointed out, the maxim *mobilia sequuntur personam* is inapplicable to gifts *inter vivos* of outside property where such gifts take effect under the laws of a province or country other than that in which the donor is domiciled at the time of his death. See *Attorney-General for Ontario v. Woodruff* (1908), A.C. 508.

Having regard to this principle, it is considered that the decision of Murphy, J., in *Re Littridge* (1927), 3 D.L.R. 250, was erroneous. In that case it was held that the Province of British Columbia had the power to impose succession duty on personal property locally situate outside its territory in the case of a decedent domiciled in British Columbia at the time of his death.

*Attorney-General for Ontario v. Fasken* (1935), 3 D.L.R. 100.

David Fasken, late of Toronto, Ontario, died on 2nd December, 1929. During his lifetime he had advanced moneys to a company incorporated under the laws of the State of Texas for the purchase of lands by that company in Texas. The company gave an acknowledgment of indebtedness. According to the law of Texas this acknowledgment constituted a simple contract debt. Fasken took this acknowledgment in favour of the trustees who thereafter acknowledged to hold the same upon the terms set forth in the declaration of trust. Middleton, J.A., held that the indebtedness of the Texas company constituted, according to the law of Texas, a simple contract debt, and that it could not

be regarded as situate elsewhere than in Texas. It was further held that any attempt by the province to tax a gift of property situate abroad was nugatory.

### Value of Gifts Inter Vivos.

The principle that valuations of property for succession duty purposes are the values existing at the time of death, includes property transferred *inter vivos*, as such property is deemed to pass on death. The date at which the value of a gift *inter vivos* is to be ascertained is accordingly the date of the death of the donor and not the date of the gift.

*Strathcona (Lord) v. Inland Revenue* (1929), S.C. 800; (1929), S.L.T. 629.

*Attorney-General for Ontario v. National Trust Company, Ltd.* (1931), A.C. 818; (1931), 3 D.L.R. 689; 100 L.J.P.C. 215; 145 L.T. 673; 47 T.L.R. 625.

*Attorney-General of Alberta v. Pearce et al.* (1932), 1 D.L.R. 587.

In *Attorney-General for Ontario v. National Trust Company, Ltd.*, the facts were that one W. E. Wilder, of the City of Toronto, an investment banker, gave to his wife on December 30, 1925, as an immediate gift *inter vivos*, 500 shares of the capital stock of Picton Securities, Ltd. Mr. Wilder died on May 28, 1929. The value of the shares at the date of the gift was \$50,240.00, and the value at the date of the death of the deceased was \$264,183.50.

The Privy Council held that the value at the date of death governed in determining the liability to duty. In the course of his judgment, Lord Hanworth said:

"Whatever may be obscure in the Act it is not easy to raise a doubt upon this point. Assuming that there is a liability to the duty, section 4 seems to lay down in simple plain terms the date at which the value is to be determined. Its terms are as follows:—'In determining the dutiable value of property the fair market value shall be taken as at the date of the death of the deceased.' It is to be noted, too, that what is to be determined is the dutiable value of the property—not of the original gift as it was made."

*In Attorney-General of Alberta v. Pearce et al.*, the Alberta Supreme Court, Appellate Division, gave judgment to the same effect. This was a special case submitted to the Court involving the right of the province to collect succession duties in respect of a gift of money distributed among the five named children of the deceased during his lifetime. The deceased at the time of his death was domiciled in Alberta. The affidavit of value disclosed an estate valued at \$78,706.28, all of which passed to the widow. Within two years prior to his death, the deceased had sold certain shares of Royalite Oil Company, Ltd., receiving therefor the sum of \$50,283.25, which amount he immediately distributed equally among his five children. The sums so distributed were invested by the children in miscellaneous investments, which, at the date of the death of the deceased, were in the aggregate worth less than the amount so distributed. It was held, however, that as the gift was in the form of cash, its value could not change, and that duty was properly payable in respect of the total amount given.

In the course of his judgment, Mitchell, J.A., says:—

"The authorities referred to make it clear that values must be fixed as at the date of death, and inasmuch as the fictional method of dealing with property passing by gift *inter vivos* is predicated upon the assumption that the property donated is to be treated just as if it had remained the property of the deceased until his death, and had then passed as part of his estate, it follows that the specific property, the subject-matter of the gift, must be taken into account and treated in the inventory as forming part of the estate of the deceased. The gift took the form of cash in the value or sum of \$50,283.25. Under the Act it is presumed to have continued in such form till the date of death. During that period its value did not alter, and it is upon that basis that the property must be inventoried."

**(f) Property Owned Jointly or Purchased or Invested  
in Joint Names.**

The English Finance Act, 1894 (57 & 58 Vict., ch. 30), includes amongst the properties liable to estate duty "any



property which a person . . . having been absolutely entitled thereto, has caused or may cause to be transferred to or vested in himself, and any other person jointly whether by disposition or otherwise, so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on his death to such other person, including also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with any other person."

This provision has been incorporated in the succession duty statutes of Nova Scotia, Prince Edward Island, and British Columbia. In the Nova Scotia statute, there is an addition to the description in these terms: "And, for greater certainty, but not so as to restrict the generality of the foregoing terms of this clause, it is hereby declared that the foregoing provisions of this clause include and extend to any property held in the joint names of the deceased and one or more persons, or deposited in banks or other institutions, and money deposited in the joint names of the deceased and one or more persons and payable to either or the survivor, except the portion thereof which is shown to the satisfaction of the Treasurer to have been contributed by the survivor."

The Saskatchewan Act designates the class of joint property which is subject to taxation as "property, including money in banks or other institutions, held in the joint names of the deceased and one or more persons and payable to or passing to the survivor or survivors or the portion of such joint property which is so payable or which passes as aforesaid, but notwithstanding anything herein contained that part of such joint property payable or passing as aforesaid which is shown to the satisfaction of the Attorney-General to have been contributed by some person other than the deceased shall not be deemed to be property passing on the death."

The dispositions which are made liable to duty by the Ontario Act include the creation of, or the contribution to a

joint tenancy of any property by the deceased when the deceased was one of the joint tenants and when one of the other joint tenants has subsequently and in the lifetime of the deceased, taken or converted such property to his own use and benefit by way of withdrawal, transfer, partition, severance or otherwise. The provision regarding joint property contained in the Saskatchewan Act has also been enacted by Ontario, with the following proviso: "Provided that where the joint tenancy or holding is created by some person other than the deceased and the survivor or survivors, such joint property shall be deemed to have been contributed to equally by the deceased and the survivor or survivors."

In the New Brunswick Act joint properties are described in the following terms:—

"Property, including money in banks or other institutions held in the joint names of the deceased and one or more persons except the part thereof which is shown to the satisfaction of the Minister to have been contributed by some person other than the deceased."

A similar description is contained in the statutes of Manitoba, Alberta, and the Yukon Territory.

By the Quebec statute, a disposition which consists of leaving to one or more survivors of several joint proprietors a property, held in common or joint ownership before the death, is assimilated to a gift in contemplation of death, and the share of the deceased is made subject to succession duty.

The severable or aliquot share of an ordinary joint tenant is property of which he is competent to dispose. This is the only ground upon which duty can be claimed in respect of joint property in circumstances where the deceased did not provide any part of the property or the purchase money.

In practice it is found that joint properties passing on the death of deceased persons usually fall within one of the following classifications, namely:—

(1) Property transferred by a husband into the joint names of himself and his wife.

(2) Personal property transferred by a man into the joint names of himself and his legitimate child or a person to whom he stands in *loco parentis*.

(3) All other cases of transfer into the joint names of the transferor and another person.

In the first two classes of transfer the law presumes an advancement for the wife or child, as the case may be, and the property transferred is subject to duty as "settled property".

In all other cases there is no presumption of any advancement being intended. On the contrary, there is presumed to be a resulting trust in favour of the person purchasing or providing the joint property. It has been held that there is no presumption of advancement so far as a husband is concerned. *Mercier v. Mercier* (1903). 2 Ch. 98; 72 L.J. Ch. 511; 88 L.T. 516; 51 W.R. 611.

The presumptions either of advancement or of resulting trusts may be rebutted by evidence to the contrary.

If a man causes a bank account to be kept in the joint names of himself and his wife, the entire moneys are subject to succession duty on his death. *Marshall v. Crutwell* (1875), L.R. 20 Eq. 328; 44 L.J. Ch. 504; 39 J.P. 775.

#### (g) Policies of Insurance.

The English Finance Act, 1894, (57 & 58 Vict., ch. 30), includes among the properties liable to estate duty:—

"(1) Any money received under a policy of insurance effected by any person, dying on or after the 1st June, 1899, on his life where the policy is wholly kept up by him for the benefit of the donee, whether nominee or assignee, or a part of such moneys in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

This revision has been incorporated in practically the same phraseology in the statutes of New Brunswick, Manitoba, Saskatchewan, Alberta, British Columbia, and the Yukon Territory, save that, in some cases, specific reference is made to accident insurance as well as to life insurance.

The Ontario Act provides that the property passing on the death of the deceased shall be deemed to include:—

- (a) money received or payable at the time of a person's death, or money representing the value of any future payments, ascertained as provided therein, as at the time of such death, under a policy of life, accident or sickness insurance, whether such insurance is payable to or in favour of a preferred beneficiary within the meaning of The Insurance Act or not, effected, contracted for or applied for by such person, where the policy is wholly kept up by him for the benefit of any existing or future donee, whether nominee or assignee, or for any person who may become a donee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit; and
- (b) money received or payable at the time of a person's death, or money representing the value of any future payments, ascertained as provided therein as at the time of such death, under a policy of life, accident or sickness insurance and whether or not effected, contracted for or applied for by such person, where the premiums on such policy were paid wholly or in part by a company, business or organization by which the deceased was employed or with which he was associated or in which he was interested, to the extent of any part of such money not paid to, or paid to and not thenceforth retained by such company, business or organization for its own use and benefit.

The Nova Scotia Act refers to insurance in the following terms:—

“Any policy of insurance which was effected, contracted for, or applied for by the deceased on his own life, or by any other person, firm or corporation on the life of the deceased, and all money received or payable thereunder

(1) where the policy was wholly kept up by the deceased for the benefit of any existing or future donee, whether nominee or assignee, or for the benefit of any person who may become a donee, or

(2) where the policy was either purchased by or assigned to the deceased for valuable consideration for the benefit of any existing or future donee, whether nominee or assignee, or for the benefit of any person who may become a donee, or

(3) where the policy was partially kept up by the deceased for the benefit of any existing or future donee, whether nominee or assignee, or for the benefit of any person who may become a donee, in proportion to the premiums paid by the deceased.”

The Prince Edward Island Act includes amongst the properties liable to taxation,—

“Money received or payable under a policy of life, endowment, or accident insurance effected upon the life of any person dying after the 30th day of April, A.D. 1934, whether payable to his estate or to a preferred or other designated beneficiary, but subject to a deduction of any debt or claim thereby *bona fide* secured to such beneficiary, including the amount of premiums, if any, paid on such policy by such beneficiary with interest thereon from the date of payment till the death of the assured at five per cent. per annum.”

The Quebec statute renders liable to succession duty,—

“(a) Life insurance policies, effected or appropriated under the provisions of section 3 of the Husbands and Parents' Life Insurance Act (Chapter 244); and

- (b) All other sums due by an insurer, by reason of the death of a person whose life is insured, when they devolve by gratuitous title."

Under the provision contained in the English Finance Act, 1894, above quoted, which has been incorporated in certain of the provincial enactments, it has been held that where a policy of insurance is assigned, it is necessary that the donor should pay the premiums or some of them after the assignment in order to render the policy moneys liable to duty on his death.

*Lord Advocate v. Robertson (or Fleming)* (1895), 22 S.S.C. 4th series, 568; (1897), A.C. 145; 76 L.T. 125.

On the 21st February, 1840, James Fleming effected a policy on his life for £300 with the Scottish Equitable Life Assurance Society. He paid the premiums on the policy until the 26th September, 1883, when he voluntarily assigned it to his daughter, Mrs. Robertson. His daughter paid all the subsequent premiums to the death of the insured on 18th February, 1890. The House of Lords held that the Crown was not entitled to duty on the policy moneys.

A policy of insurance is usually considered to be effected by the person who provides the first premium. It has been held the Manitoba Court of King's Bench, however, that this rule is not always applicable.

*Re Thacker* (1931), 1 D.L.R. 1015; 39 M.R. 375.

This was an application for directions as to the incidence of succession duty on a life insurance policy. An insurance policy was taken out by a company on the life of its manager, the late J. G. Thacker. At the time he had no personal interest in it and the premiums were paid by the company. Two years later the shares in that company were sold to another company and the former company having no further need for the insurance, assigned the policy to Thacker for \$500.00 cash, the necessary steps being taken to name Thacker's wife as beneficiary. Thenceforward the policy was kept in force wholly by Thacker. Later a trust

fund was created by Thacker, including this policy, and the name of the trustee duly substituted as beneficiary: at his death this policy was held under the trust by the trustee.

The contention for the executor was that this policy was not effected by Thacker and the taxing statute must be strictly construed.

Kilgour, J., held that not only did Thacker sign the original application, but the insurance could not have been effected without his being a party to it. This, combined with the subsequent transactions, were sufficient to bring it within the statute.

As insurance policies payable to designated beneficiaries do not form any part of the estate of a deceased person, the estate cannot be called upon to pay any succession duty in respect thereof, but such duty is payable by the beneficiaries out of the insurance moneys. *Re Murphy* (1932), 2 D.L.R. 588.

By certain of the provincial statutes provision has been made for exemption of insurance moneys from taxation to a limited extent.

The New Brunswick Act provides for exempting "the amount of any life insurance policy or policies effected by a deceased person on his life and expressly made payable to the Treasurer or an executor or trustee for the purpose of paying duty imposed by this Act, except as to any excess in such amount over and above the amount of the duty, which excess, received by the Treasurer, shall be accounted for by him to the person entitled thereto."

A similar provision is contained in the statutes of Prince Edward Island, Nova Scotia, Manitoba, Saskatchewan, Alberta, and the Yukon Territory.

In addition to this exemption of insurance moneys expressly ear-marked for the payment of duties, certain of the provinces have also made provision for exemption of insurance payable to preferred beneficiaries, provided the

amounts payable do not exceed a stated minimum. These exemptions are as follows:—

*Nova Scotia*.—Moneys received or payable under a contract of insurance effected by any person on his life if such moneys are payable to the grandfather, grandmother, father, mother, husband, wife, child, grandchild, daughter-in-law or son-in-law of the deceased, and if the aggregate amount of such insurance or insurances does not exceed \$5,000.

*Saskatchewan*.—Moneys received or receivable under a contract of insurance effected on his life by a person dying on or after the third day of February, 1922, if such moneys are payable under the terms of the contract to the husband, wife, child, grandchild or mother of the deceased and the total amount of the moneys payable under any one contract does not exceed \$5,000, provided, however, that if any one beneficiary receives more than \$5,000 by reason of the deceased having effected two or more contracts of insurance on his life, then the moneys received or receivable by the beneficiary under such contracts shall not be subject to any exemption.

*Manitoba*.—Money received or receivable under a policy of insurance on the death of a deceased resident in the province, payable to or for the use of his widow or children, or both, when resident in the province, not exceeding

- (i) five thousand dollars in the aggregate, in case the deceased leaves surviving him a widow or a child under eighteen years of age, or both; and
- (ii) ten thousand dollars in the aggregate, in case the deceased leaves surviving him either a widow and more than one child under eighteen years of age or two or more children under that age.

*British Columbia*.—Proceeds of insurance not exceeding \$25,000 passing to or for the use of the father, mother, husband, wife, child, grandchild, son-in-law, and daughter-in-law of the deceased. Where the insurance exceeds \$25,000 duty is charged on the excess amount.



### Insurance Moneys Payable to Specific Beneficiaries.

In the Manitoba Succession Duty Act the following provision is made with respect to insurance moneys payable to specific beneficiaries:—

"In case duty is not otherwise payable under the provisions of this Act in respect thereof, a person domiciled or resident in the province who receives or becomes entitled to receive within the province as assignee or nominee, a beneficial interest in money payable under a policy of life insurance or of accident insurance upon the life of a person who was resident within the province at the time of his death, where the policy was wholly kept up by the deceased for the benefit of an existing or future donee, shall be liable to pay duty on the dutiable value thereof."

A similar provision is contained in the statutes of New Brunswick, Alberta, and the Yukon Territory.

It is somewhat difficult to determine as to whether this provision is intended to be a tax upon the insurance moneys considered as property, or upon the beneficiaries resident in the taxing province who receive or become entitled to receive the moneys within the province. If the intention is to tax the insurance moneys directly by reason of the receipt of such moneys in the province, then the provision may be *ultra vires* in so far as it relates to insurance which, although it is actually received in the province, is nevertheless not an asset situate there as at the time of the death. If a policy of insurance is under seal, the situs of the debt is determined by the place where the policy is found at the death of the deceased. *Gurney v. Rawlins* (1836), 2 M. & W. 87. If, on the other hand, the policy is not under seal, the situs of the debt is generally determined by the location of the head office of the company, unless it has been localized and made payable in some other place.

If the intention of the Manitoba Act is to tax the beneficiary personally, it is noteworthy that he does not become liable unless and until he receives or becomes entitled to receive within the province a beneficial interest in the insur-

ance moneys. It is thought that the beneficiary cannot be regarded as being entitled to receive the moneys other than in the jurisdiction in which the debt is situate, so that if the debt is situate outside the province at the time of the death, the beneficiary cannot be said to be entitled to receive the moneys within the province.

**(h) Annuities or Other Interests Purchased or  
Provided by the Deceased.**

Among the properties made liable to estate duty under The English Finance Act, 1894, the following is included:—

“Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.”

This provision has been included in practically the same phraseology in all the provincial statutes with the exception of that in force in the Province of Quebec.

As a result thereof, if an assured person makes a settlement of a policy on his life, succession duty becomes payable on the policy moneys on his death, irrespective of whether the premiums were paid by him or by any other person who was a party to the settlement.

*Atty.-Gen. v. Dobree* (1900), 1 Q.B. 442; 69 L.J.Q.B. 223; 81 L.T. 607; 48 W.R. 413.

By a settlement dated 20th September, 1867, made after the marriage in pursuance of an ante-nuptial agreement, Falconer J. Atlee assigned a policy on his own life to trustees to hold the money received under the policy in trust for his wife for life, remainder for his children. He covenanted to pay the premiums on the policy during his life, and did so. It was held by Darling and Channell, JJ., that estate duty was payable on his death on the policy moneys under section 2 (1) (d) of the English Finance Act, 1894.

*Atty.-Gen. v. Robinson* (1901), 2 I.R. 67; W.N. (1901), 192.

A., on his marriage in 1843, settled four policies of insurance upon an arrangement whereby the subsequent premiums should be paid out of the income of certain other property settled by the wife. The policies were kept up and the annual premiums paid out of the income of the moneys brought into settlement by the wife until the death of A. in 1898. The Crown claimed estate duty on the policy moneys, and the Court upheld the claim.

The purchase or provision of an annuity or other interest, in whole or in part, must have been made by the deceased himself. No duty is payable where the interest has been purchased or provided by another person in concert with the deceased.

*Atty.-Gen. v. Murray* (1903), 2 K.B. 64; 72 L.J.K.B. 408; 88 L.T. 474; (1904), 1 K.B. 165; 73 L.J.K.B. 66; 89 L.T. 710.

Sir Henry William Peek effected a policy in his own name on the life of his infant son, Cuthbert Edgar Peek, upon which only ten premiums were to be paid. Sir Henry William Peek paid these premiums. On the marriage of C. E. Peek in 1884, Sir Henry William Peek assigned the policy to the trustees of the son's marriage settlement in trust for the son's wife for life. On the son's death on the 6th July, 1901, estate duty was claimed. The Court of Appeal rejected the claim, and held that the policy was not provided by the deceased in concert or by arrangement with another.

The provision made by the deceased must be real, and if he has been recouped during his lifetime for any payments he may have made in the way of premiums, duty is not payable.

*Richardson v. Commissioners of Inland Revenue* (1909), 2 Ir. R. 597; 53rd Int. Rev. Rep. 50.

A wife verbally agreed with her husband that the income to which she was entitled under a certain settlement should be applied in payment of the premiums on a policy he had taken out on his life. This arrangement was carried

out. It was held in the King's Bench Division, Ireland, that the policies had not been purchased or provided by the deceased, and were therefore exempt from duty.

Compensation payable on the death of any person under any Workmen's Compensation Act, or Employers' Liability Act, is not liable to duty, as such compensation is not considered to form part of the deceased employee's estate, and it cannot be said to have been provided by him.

The following are examples of annuities and other interests wholly provided by the deceased, or by him and another person or other persons in concert or by arrangement:—

1. An annuity purchased by him, and payable to himself for life, and on his death to his widow for life.

2. An annuity purchased by the deceased for the joint lives of himself and wife, and on the death of the deceased, for the survivor for life.

3. An annuity provided by the deceased on retirement from partnership.

4. Provident funds which are aided by employers for the benefit of widows and children of deceased employees. In this case, no deduction is allowed for the contributions of the employer, as the provision is really made by the deceased in concert or by arrangement.

5. Sums payable under the rules of certain benefit clubs or societies, where each member pays an entrance fee, and on the death of a member, all the other members are required to contribute a certain prescribed sum for the benefit of the next of kin of the deceased member.

Where an annuity or other interest is provided by the deceased jointly with another person or other persons who contribute a share of the purchase price, the claim for duty, in any event, cannot extend beyond the value of the annuity or interest as is attributable to the deceased's contribution.

It is conceived that in the case of certain joint survivorship annuities no duty would be payable. Thus, if a survivor-

ship annuity is purchased jointly by two persons of approximately the same age, each providing one-half of the purchase money, the transaction really amounts to a purchase for valuable consideration, and each annuitant really provides the benefit which passes to him, with the result that no duty is payable on the death of either.

This principle would not apply where the purchase price of the annuity is contributed in unequal shares, and in this case duty is properly chargeable on the death of the larger contributor on the value of so much of the annuity as is attributable to the difference between the contributions.

#### **Provident Funds and Superannuation Schemes.**

Questions frequently arise as to whether or not provident funds, pension funds, and similar benefits, connected with the deceased's employment, are subject to succession duty. The terms of each particular scheme have to be considered before it can be determined as to whether or not duty is payable. In general, liability will arise when it is established,—

- (a) That an express or implied contract or arrangement was entered into as between the deceased and his employers under which the benefits are payable;
- (b) That the payment of the benefits can be enforced; and
- (c) That the deceased contributed directly or indirectly to the scheme.

No duty is payable in respect of mere voluntary payments made by employers to the relatives of deceased employees, or to such employees directly, as, for example, gratuities paid to civil servants. Where such gratuities can be claimed as of right, however, duty is payable. *Attorney-General v. Quixley* (1929), 98 L.J.K.B. 652; 141 L.T. 288; 93 J.P. 227; 45 T.L.R. 455.

**(i) Property Comprised in a Settlement.**

The provincial succession duty enactments, with the exception of that in force in the Province of Quebec, make provision with regard to the taxation of settled property along similar lines to that contained in section 38 of the English Customs and Inland Revenue Act, 1881 (44 & 45 Vict., ch. 12), as amended by section 11 of the Act of 1889 (52 & 53 Vict., ch. 7). This provision includes for all purposes of the enactments:

"Any property passing under any past or future settlement made by any person dying on or after (the date mentioned in the particular statute), by deed or other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property. The expression 'settlement' is to include any trust, whether expressed in writing or otherwise, and, if contained in a deed or other instrument affecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression 'such property' included the proceeds of sale thereof."

This provision brings within the operation of all the provincial enactments, except as above mentioned, all settlements by the deceased, whereby he reserves a life interest, a general power of appointment, or a power of revocation.

The following cases, though decided as to the English account stamp duty, would appear to apply with equal force in the provinces where the legislation is similar:—

*Atty.-Gen. v. Gosling* (1892), 1 Q.B. 545; 61 L.J.Q.B. 429; 66 L.T. 284.

By articles of partnership, R. Gosling was given power by deed or will to dispose of his share in the business to

any of his sons or grandsons or to certain other specified persons. He died on the 20th July, 1889, having by his will given his share in the business to his eldest son. It was held that the deceased had reserved to himself a life interest in his share of the partnership, that the appointment in favour of the son must be read into the articles, and that account duty was therefore payable under the Act of 1881. Wills, J., said: "The object of the Act was to strike with liability to such duty dispositions which, while preserving to a man the enjoyment of personal property to the day of his death, make the same property pass on his death to some one else, and so become substitutes for wills."

*Atty.-Gen. v. Heywood* (1887), 19 Q.B.D. 326; 56 L.J. Q.B. 572; 57 L.T. 271.

By Indenture of Settlement dated 15th June, 1878, the settlor assigned to trustees a sum of money upon trust to apply the income during the settlor's life at their discretion for the benefit of the settlor or his wife or children, and, on the settlor's death, to hold the fund for his widow and children. The settlor died on the 9th June, 1885, having received the income to his death. It was held that "an interest" for life having been reserved to the settlor, the fund was liable to account stamp duty.

*Atty.-Gen. v. Chapman* (1891), 2 Q.B. 526; 60 L.J.Q.B. 602; 65 L.T. 119; 40 W.R. 79.

By a marriage settlement dated 30th August, 1843, the settlor transferred certain property to trustees, on trust to pay the income to herself for life, and on her death to her husband for life, and on death of the survivor, in default of children, for such persons as the settlor should appoint. There were no children, and the husband predeceased the settlor. By deed, dated 30th August, 1848, the settlor appointed to her niece, and died in 1888. It was held that as the property "passed" under the settlement of 1843, by which a life interest was reserved to the settlor, account stamp duty was payable.

*Atty.-Gen. v. Wendt* (1895), 43 W.R. 701; 73 L.T. 255; 65 L.J.Q.B. 54.

By articles of partnership, the widow of a deceased partner became entitled on his death to an annuity. It was held that this annuity was property which passed under a voluntary settlement to the widow within the meaning of the Customs and Inland Revenue Act, 1881.

**(j) Property in which the Deceased had an Interest Ceasing on the Death to the Extent to which a Benefit Accrues or Arises by His Death.**

By section 2 (1) (b) of the English Finance Act, 1894, it is provided that the property passing on the death of the deceased for the purposes of that Act shall be deemed to include, "property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity or as a corporation sole."

This provision has been embodied in the statutes of Nova Scotia, Prince Edward Island, Manitoba and Alberta.

In *Cowley v. Inland Revenue Commissioners* (1889), A.C., at p. 212, Lord Macnaghten comments upon this provision, as follows: "With an interest that ceases on death the Act is not directly concerned, except in the one case where without any passing of property a benefit accrues or arises by reason of the cesser of a determinable interest such as a 'charge that expires.'"

As an example of cases falling within this section, see *Atty.-Gen. v. Watson* (1917), 2 K.B. 427; 86 L.J.K.B. 1034; 117 L.T. 187.

A testator by will gave an annuity primarily out of the income of his residuary estate and the annuitant died two days after the testator. It was held that estate duty was payable on her death on the proportion of the residuary



estate required to produce the annuity, as the annuitant had an interest in such residuary estate within the meaning of section 2 (1) (b) of the Finance Act, 1894.

Lush, J., said: "On behalf of the defendants it has been contended that the annuitant had no interest in the corpus, and that no annuitant can be said to have an interest of the property out of which the annuity is payable unless the property has been actually appropriated and set apart to answer the annuity. . . . In my judgment that is not the true interpretation to be placed upon section 2 (1) (b) of the Finance Act, 1894. . . . In my judgment this annuitant had, according to the ordinary use of language, an interest in the corpus of this property; she had an annuity accruing from day to day, payable out of the property, and it was to that property that the annuitant would necessarily look for the payment of her annuity. It is true she had no estate in the property, but she had an interest in it, because that was the source of the annuity bequeathed to her by the testator."

See also *Eastern Trust Company v. Plummer* (1932), 3 D.L.R. 158; 5 M.P.R. 161. In this case, James H. Plummer executed a deed under which certain securities were placed with a company, the dividends from the securities being payable to his son until a named date, when the securities themselves were to be transferred to the son. The deed also provided that in the event of the son's dying before the said date, the securities should be transferred to the son's executors to be held by them on the same trusts as they held the estate of the son. The son having died before the date fixed for the transfer of the securities, it was held that the securities were liable to succession duty in the Province on the death of the son, they being property which passed or must be deemed to have passed within the meaning of the Nova Scotia Succession Duty Act, 1923, chapter 18, which provided for the taxation of "property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the ceasing of such interest."

**(k) Estates in Dower or by the Curtesy.**

It is provided by the statutes of Nova Scotia, Prince Edward Island and Ontario that property passing on the death of the deceased shall be deemed to include for purposes of succession duty any estate in dower or by the curtesy in any land of the deceased in which the wife or husband of the deceased becomes entitled on the death of the deceased.

This provision has a similar effect to that contained in subsection (3) of section 22 of The English Finance Act, 1894, as follows:—

“(3) This Part of this Act shall apply to property in which the wife or husband of the deceased takes an estate in dower or by the curtesy of any other like estate, in like manner as it applies to property settled by the will of the deceased.”

The statutes of New Brunswick, Manitoba, and Alberta, provide for the taxation of “any estate or interest in property of the deceased to which the wife or husband of the deceased becomes entitled under the provisions of any statute on the death of the deceased.”

## CHAPTER X.

### THE RATES OF SUCCESSION DUTY.

The rates of succession duty payable under the several provincial enactments are determined mainly by two factors, namely:—

- (a) The relationship, if any, of the beneficiary to the deceased; and
- (b) The aggregate value of the property passing or deemed to pass on the death of the deceased.

For purposes of taxation the beneficiaries are usually divided into three classes, which may conveniently be described as the preferred, collateral and stranger classes respectively. These terms may not be strictly accurate, as in certain of the provinces near relatives are included in class two as well as collaterals, and the third class of beneficiaries includes, in certain cases, not only strangers, but also distant relatives. The following are particulars of the classification at present existing in each of the provinces:—

#### Class 1—Preferred.

**Ontario:**—Grandfather, grandmother, father, mother, husband, wife, child, son-in-law or daughter-in-law of the deceased.

The expression "child" is defined in the Ontario Act as including any lawful child of the deceased or any lineal descendant of such child born in lawful wedlock or any person adopted while under the age of twelve years by the deceased as his child or any person to whom the deceased, during the infancy of such person, stood in *loco parentis* for a period of not less than five years or any lineal descendant of such adopted child or person as aforesaid.

**Quebec:**—Any lineal ancestor or descendant, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-

law, stepfather, stepmother, stepson or stepdaughter of the deceased.

*Nova Scotia*:—Grandfather, grandmother, father, mother, husband, wife, child, grandchild, daughter-in-law or son-in-law of the deceased.

"Child" is defined as meaning any lawful child of the deceased or any person legally adopted while under the age of twelve years by the deceased as his child, or any person taken while under the age of twelve years by the deceased as his child and to whom the deceased continuously since such taking and for not less than five years immediately preceding his death stood in *loco parentis* or any lineal descendant of such child or person born in lawful wedlock.

*New Brunswick*:—Father, mother, husband, wife, child, daughter-in-law or son-in-law of the deceased.

"Child" is defined as including any child of the deceased, born in lawful wedlock or legitimized, and any person adopted while under the age of sixteen years by the deceased as his child, and any person to whom for not less than five years immediately preceding the majority of such person the deceased stood in *loco parentis*.

*Prince Edward Island*:—Wife with a dependent child or children by the deceased, dependent child or children, or the wife and dependent child or children of the deceased.

"Dependent child" is defined as meaning a son or daughter under twenty-one years of age, or incapable of self-support on account of mental or physical infirmity.

*Manitoba*:—Father, mother, husband, wife, or child of the deceased.

"Child" is defined as including a child of the deceased, born in wedlock or legitimized, or a person adopted by the deceased as his child, or a person to whom during his infancy the deceased stood in *loco parentis* for a period of not less than ten years.

**Saskatchewan:**—Father, mother, husband, wife, child, son-in-law or daughter-in-law of the deceased.

“Child” means a lawful child of the deceased, and includes a person lawfully adopted while under the age of twelve years by the deceased as his child, a person to whom the deceased during the infancy of such person stood in *loco parentis* for a period of not less than ten years, and any lineal descendant of such child, adopted child or person, born in lawful wedlock.

**Alberta:**—Grandfather, grandmother, father, mother, husband, wife, child, son-in-law or daughter-in-law of the deceased.

“Child” includes any child of the deceased, born in lawful wedlock or legitimized, and any person adopted by the deceased as his child, and any person to whom during his infancy the deceased stood in *loco parentis* for a period of not less than five years, and any lineal descendant of a child as above defined if born in lawful wedlock or legitimized.

**British Columbia:**—Father, mother, husband, wife, child, grandchild, son-in-law or daughter-in-law of the deceased.

“Child” includes any lawful child of the deceased, any illegitimate child of a deceased mother, any child of the deceased deemed to be legitimate by virtue of the “Legitimation Act”, any person lawfully adopted by the deceased as his child, any person to whom during his infancy the deceased stood in *loco parentis* for a period of not less than ten years, and any lawful lineal descendant of any child or person referred to in this definition.

**Yukon Territory:**—Father, mother, husband, wife, or child of the deceased.

“Child” includes a child of the deceased, born in wedlock, or a person adopted by the deceased as his child, or a person to whom during his infancy the deceased stood in *loco parentis* for a period of not less than ten years.

The British Columbia Court of Appeal considered the definition of "child" contained in the British Columbia Act in the judgment delivered by it *In re Redmond Estate; Attorney-General of British Columbia v. Royal Trust Company*, 44 B.C.R. 390; (1931), 3 W.W.R. 18.

Janey Redmond, born in the General Hospital at Vancouver, in January, 1917, was, with the consent of her mother, adopted by the deceased and his wife shortly after her birth. The deceased and his wife had lived apart for some years prior to the adoption of the child, but he provided for her maintenance by payment of \$40 a month and they visited one another from time to time. Upon the adoption of the child, who took the name of her foster parents, she lived with the wife in Vancouver, but deceased, who lived in Victoria, visited her four or five times a year, and the child visited him three or four times a year in Victoria. He shewed his affection for the child by giving her presents and providing her with clothes and money for her education. By his will, the deceased bequeathed to the child one-half of the residue of his estate. On the application of the executors for the determination of the amount of succession duty, it was held that the duty should be determined on the basis of the deceased occupying the position of *loco parentis* to Janey Redmond.

#### Class 2—Collateral.

**Ontario:**—Any lineal ancestor of the deceased (except the grandfather, grandmother, father and mother); any brother or sister of the deceased or any descendant of such brother or sister; any brother or sister of the father or mother of the deceased or any descendant of such last-mentioned brother or sister.

**Quebec:**—Any brother or sister, or descendant of a brother or sister of the deceased, or any brother or sister, or son or daughter of a brother or sister, of the father or mother of the deceased.

**Nova Scotia:**—Any lineal ancestor or descendant except those specified in class 1; any brother or sister of the de-

ceased; any child or grandchild of such brother or sister; any brother or sister of the father or mother of the deceased; or any child or grandchild of such last mentioned brother or sister.

*New Brunswick*:—Any lineal ancestor or descendant of the deceased except those specified in class 1; any brother or sister of the deceased; any child or grandchild of such brother or sister; any brother or sister of the father or mother of the deceased; or any child or grandchild of such last-mentioned brother or sister.

*Prince Edward Island*:—Father, mother, brother, sister, grandchild, daughter-in-law, son-in-law, husband of the deceased, or wife of the deceased without dependent children of the deceased living at the time of his death.

*Manitoba*:—Grandfather, grandmother, grandchild, son-in-law, daughter-in-law, brother or sister of the deceased, or a child of such brother or sister.

*Saskatchewan*:—Any lineal ancestor of the deceased (except father or mother); any brother or sister of the deceased, or any descendant of such brother or sister; any brother or sister of the father or mother of the deceased or any descendant of such last mentioned brother or sister.

*Alberta*:—The same classification exists in Alberta as in the Province of Ontario.

*British Columbia*:—Grandfather, grandmother, uncle, aunt, cousin, brother or sister of the deceased, or any descendant of his brother or sister.

*Yukon Territory*:—Grandfather, grandmother, grandchild, son-in-law, daughter-in-law, brother or sister of the deceased, or a child of such brother or sister.

### **Class 3—Strangers and Distant Relatives.**

In this class are included all persons in other degrees of consanguinity to the deceased than those included in the preceding two classes, and strangers in blood to the deceased.

### **Resemblance of Taxation to English Legacy and Succession Duties.**

The provincial succession duty enactments do not make the same distinction as the English law has made between probate duties and legacy and succession duties. Nevertheless, the provincial tax resembles the English legacy or succession duties in the following respects, namely,—

- (a) It is payable on property devolving under wills or intestacies, and on *donationes mortis causa*; and
- (b) The rates of taxation vary according to the relationship, if any, of the beneficiary to the deceased.

The definition of "property" contained in the provincial statutes generally includes every estate or interest in property capable of being devised or bequeathed by will. It would appear to follow, as a logical consequence, that all legacies and bequests, which has been held liable to legacy duty in England, are also liable to succession duty under provincial legislation.

### **Disclaimer of Legacy.**

If a legatee or beneficiary entitled upon an intestacy disclaims the benefit, he cannot be charged with duty. He must, however, expressly renounce all claim to the benefit or refuse to accept it. The execution by the beneficiary of a so-called disclaimer in favour of another person is generally construed as an acceptance and an assignment of the benefit.

### **Compromise Agreements between Beneficiaries.**

Under section 23 of the English Legacy Duty Act, 1796, where any legacy or residue is released for consideration or compounded for less than its amount or value, duty is payable only on the amount actually received. There is no such provision in the provincial succession duty statutes, and it has been held that when a will is admitted to probate, succession duty must be paid under its provisions without reference to any subsequent arrangement among the beneficiaries.



*In re T. D. Smith Estate* (1916), 10 W.W.R. 1090; 34 W.L.R. 834.

The question as to the validity of a residuary devise in a will coming on before the Court upon originating notice, all parties were ordered to be represented by counsel except the Crown. The point was not determined, a settlement approved by the Court being entered into. Subsequently the Crown claimed succession duty at 10 per cent. on the whole estate under R.S. Manitoba, 1913, ch. 187, sec. 6, column 6.

It was held by Curran, J., in Chambers (Manitoba), that the approval of the settlement was not in any sense or to any extent a judicial determination of the question originally submitted to the Court, that the Crown was not bound by it in any event, and that the duty was payable at the rate of 10 per cent.

*Batt v. Treasurer*, 209 Mass. 459; 95 N.E. 854.

Under a certain compromise agreement the beneficiaries changed the distribution of the property of the deceased as directed by the will. It was held that the duty should be assessed in accordance with the terms of the will.

### **Legacies for Payment of Debts.**

A direction in a will to pay the testator's own debts is not a legacy subject to duty. *Williamson v. Naylor* (1838), 3 Y. & C. Ex. 208; 160 E.R. 676. If, by reason of bankruptcy proceedings, a debt has ceased to be a legal obligation, a direction by a testator for the payment thereof operates as a legacy. *Turner v. Martin* (1857), 7 DeG. M. & G. 429; 27 L.J. Ch. 216; 28 L.T.O.S. 349; 5 W.R. 277; 44 E.R. 168.

A direction to pay the debts of another person is a gift to such person of the amounts owing, provided the debtor is solvent. If he is insolvent, the direction operates as a gift to the creditor, and duty is payable accordingly. *Foster v. Ley* (1835), 2 Bing N.C. 269; 5 L.J.C.P. 17; 132 E.R. 106.

The release by will of a debt owing to the testator is a legacy. *Attorney-General v. Holbrook* (1823), 3 Y. & J. 114;

148 E.R. 1115; *Morris v. Livie* (1842), 1 Y. & C. Ch. Cas. 380; 11 L.J. Ch. 172; 62 E.R. 934.

### Conditional Bequests.

As a general rule, a legacy subject to a condition is subject to duty without regard to the condition. *Re Thorley, Thorley v. Massam* (1891), 2 Ch. 613; 60 L.J. Ch. 537; 64 L.T. 515; *Attorney-General v. Sharpe* (1891), 7 T.L.R. 558, C.A.

A gift for maintenance, however, usually gives rise to a claim for duty as against the persons to be benefited. *In re Harris* (1852), 7 Exch. 344; 21 L.J. Ex. 92; 18 L.T.O.S. 278; 155 E.R. 980.

Bequests for the saying of masses are liable to duty as in the case of other legacies. Such bequests were held to be legal by the *House of Lords in Bourne v. Keane* (1919), A.C. 815; 89 L.J. Ch. 17; 121 L.T. 426.

### Bequests to Executors.

Frequently bequests are made to executors and administrators in order to compensate them for their trouble. Unless there is a statutory exemption applicable to such bequests, they are liable to duty. *Re Pooley* (1888), 40 Ch. D. 1; 58 L.J. Ch. 1; 60 L.T. 73.

Section 54 of the Saskatchewan Act provides for exemption of such bequests in the following terms:—

“Where a bequest or devise of property, which otherwise would be liable to the payment of the duty under this Act, is made through an executor or trustee in lieu of commission or allowance, and the said bequest or devise exceeds what would be reasonable compensation for the services of such executor or trustee, the excess shall be liable for duty, and duty shall be payable in respect of the succession to such excess compensation, and a reasonable compensation shall, unless otherwise agreed upon with the Attorney-General, be fixed by a Judge of the Court of King’s Bench.”

A similar provision is contained in the Prince Edward Island statute.

### Charitable and Religious Bequests.

Bequests to charitable and religious institutions, and to associations, clubs, and similar bodies, are subject to taxation on the same basis as bequests to persons who are strangers in blood to the testator.

*Re Parker* (1859), 4 H. & N. 666; 29 L.J. Ex. 66; 33 L.T.O.S. 288; 23 J.P. 406; 7 W.R. 660.

In this case, Pollock, C.B., said that where money is bequeathed, whether to those who administer a charity, or who administer a fund for any public purpose, it is subject to duty on the stranger basis, inasmuch as it is to be considered a legacy for the benefit of persons strangers in blood to the testator.

A legacy to a church or philanthropic institution is one to a "person."

*In re Muir Estate* (1917), 2 W.W.R. 801.

This was an application made before Galt, J., in Chambers (Manitoba), on behalf of the Standard Trusts Company, as executors under the will of Robert Muir, deceased, asking for advice and direction in regard to a legacy claimed by the Central Congregational Church and certain other beneficiaries. It was held that a legacy to a church or other philanthropic institution is one to a "person" (by virtue of the Interpretation Act) and, where less than \$2,000.00, is, by virtue of section 5 (2) (b), ch. 45, 1906 (Man.), exempt from payment of succession duty.

### Status of Beneficiaries.

Where a person dies domiciled in a country whose laws permit polygamous marriages, the status of the beneficiaries will be recognized accordingly for succession duty purposes.

*In re Succession Duty Act; Lee Shek Yow v. Atty.-Gen. of British Columbia* (1924), 1 W.W.R. 753, reversing *sub nom. In re Succession Duty Act; In re Lee Cheong* (1923), 1 W.W.R. 867; 31 B.C.R. 437.

This was an appeal to the British Columbia Court of Appeal from the judgment of McDonald, J., dismissing a petition by the executor of the will of the late Lee Cheong for a declaration that each of the wives of the testator was entitled to be recognized as his lawful wife for the purpose of fixing succession duty. The appeal was allowed.

It was accordingly held that if a person, domiciled in a country whose laws permit polygamous marriages (*e.g.*, China), is, in accordance with its laws, married there to two wives, citizens of that country, and dies while still domiciled there though temporarily residing in British Columbia, the status of the said wives as wives of the deceased will be recognized by the courts of British Columbia for the purpose of fixing the succession duty payable on movable property of the deceased in British Columbia going under the deceased's will to each of the wives.

#### **Half-blood Relatives.**

For purposes of succession duty, relatives of the half-blood have the same status as those of the whole blood.

*In re Oliver* (1901), 8 B.C.R. 91.

Grace M. Marshall issued a summons to determine the amount of succession duty payable by her under the British Columbia Succession Duty Act (Amendment Act), 1899. The applicant was a half-sister of W. H. Oliver, deceased, and a devisee under his will. Martin, J., held that the words "sister of the deceased" in subsection 4 of section 2 of the Act did not include a half-sister. An appeal was taken from this judgment to the Full Court, and was allowed with costs.

#### **Fund Out of which Legacies Payable.**

In order to allocate the duty payable as between the several properties passing on the death of a deceased person, it is important to determine whether or not his will creates, or discloses an intention to create out of the real and personal estate a mixed fund to be applied in the payment of legacies.

*In re Lord Strathcona Estate* (1918), 2 W.W.R. 499; 28 Man. R. 579.

This was an appeal to the Manitoba Court of Appeal from a decision of the County Court Judge of Winnipeg, and was brought by the Provincial Treasurer in respect of the amount of succession duty payable in the estate of Lord Strathcona.

The Provincial Treasurer contended that the legacies mentioned in the will were payable out of the real and personal estate *pro rata*. The executors, on the other hand, contended that the real estate in Manitoba formed part of his residuary estate and passed to the deceased's daughter.

The contention of the Provincial Treasurer was not upheld, the Court holding that the will did not create out of the real and personal estate a mixed fund for the payment of legacies, so as to bring it within the rule in *Roberts v. Walker*, 1 Russ. & M. 752.

#### Legacies Given Free of Duty.

Where money or property is bequeathed, free of duty, this in, in effect, a second legacy of the amount of the duty. *Noel v. Henley* (Lord) (1819), 7 Price 241; *Farrer v. St. Catherine's College, Cambridge* (1873), L.R. 16 Eq. 19; 42 L.J. Ch. 809; 28 L.T. 800; 21 W.R. 643.

See also *Re Anderson, Canada Permanent Trust Co. v. McAdam* (1928), 4 D.L.R. 51; 22 S.L.R. 610; reversing (1928), 1 D.L.R. 182; 22 S.L.R. 135. In this case, it was held that a provision in the will of a deceased person directing a legacy to be paid free from succession duty constituted an additional legacy of the amount of the duty, and this was not rendered ineffective by a statutory provision directing payment of succession duty out of the legacy.

Where the will of the deceased person provides that all legacies are to be free of succession duty, the word "legacy" does not include a gift of residue.

*Re Whitney*, 40 O.W.N. 568; affirming 66 O.L.R. 339.

The late E. C. Whitney, by his will, made a specific devise of thirty shares in the Mississippi Land Company, a

Minnesota Corporation; eight shares to St. Barnabas Hospital, Minneapolis; seven shares to the Sheltering Arms of Minneapolis; eight shares to Toronto University; and seven shares to Wycliffe College; upon the expiry of five years after his death or the prior decease of his wife if the shares mentioned should form part of his residuary estate after providing for all legacies, bequests and annuities set out in the will. He further provided that at that same time and after distribution out of his residuary estate of the Mississippi Land Company shares, his trustees were to convert all his remaining residuary real estate into cash and realize on his remaining personal estate and divide the same equally among the four beneficiaries of the Mississippi Land Company's shares. The testator further provided that all legacies, funds and stocks transferred should be free of succession duty.

It was held that, in the absence of a contrary direction in the will, the word "legacy", as used in the provision freeing legacies from succession duty, did not include a gift of residue, and that accordingly the testator did not intend to relieve the four institutions from the obligation to pay such succession or legacy duty or inheritance tax as might be chargeable against them.

*In re Blowey Estate*, 50 B.C.R. 222.

The will of Thomas Blowey, deceased, directed the trustee to sell and convert into money all property, and "with and out of the moneys produced by such sale, calling in and conversion, and with and out of my ready money, pay my debts, funeral and testamentary expenses, and all probate, legacy and succession duties and the following legacies." Then followed legacies to a niece, a nurse, and two sons, James and Harry, and then the will provided "All above legacies to be free of probate, legacy and succession duties." Then the will gave a quarter of the residue absolutely to James and one-third of the income from the investment of the remaining three-quarters of the residue for his life and upon his death to his wife for life and thereafter to their children. The remaining two-thirds of said income was given

to Harry for his life and then to his wife and then to their children.

It was held that the paragraph in the will "that all above legacies are to be free of probate, legacy and succession duties" applied only to the three legacies mentioned, and that the duties applicable to the other shares bequeathed by the will were payable out of such shares.

#### Aggregation.

The rate of duty payable on any property or with respect to the succession to or transmission of any property is partly determined by the aggregate value of all the property passing or deemed to pass on the death of the deceased, and partly by the relationship of the beneficiary to the deceased.

Property exempt from taxation is nevertheless liable to aggregation, unless otherwise provided.

*In re Shambrook Estate*, 28 C.L.T. 575.

In this case, an insurance on the life of the deceased for \$2,000.00 payable to his wife was admitted to be exempt from succession duty under the provisions of the Ontario Act then in force. It was contended by the Solicitor for the Treasury, however, that this sum should be added to the aggregate value of the other property passing on the death for the purpose of determining the rate of duty applicable to such other property. The Surrogate Court Judge upheld this contention.

*Re Mills* (1928), 3 D.L.R. 106; 23 A.L.R. 521.

The Alberta Supreme Court, Appellate Division, held that tax-free bonds were not deductible from an estate in ascertaining the net value for succession duty purposes. In the course of his judgment, Ives, J., says: "This is an application by the executrix to determine what property of the estate is liable to duty and the amount thereof. Part of the estate property passing at death consists of Alberta provincial bonds which are exempt from succession duty by the provisions of the Provincial Loans Act, 1910. To arrive at the amount of duty the first item to be considered is the net

value of the deceased's property. The net value is defined by section 3(e) of the Succession Duties Act as, 'the aggregate value, less the debts, incumbrances, and other allowances authorized by this Act,' and 'aggregate value' is defined as 'the fair market value of the property of a deceased person, both within and without the province, before the debts, incumbrances and other allowances authorized by this Act are deducted therefrom.' Here the property in the shape of duty free bonds is clearly included in the aggregate value of the estate and nowhere in the Act is there provision allowing their value to be deducted from the aggregate value in ascertaining the net value. Therefore, the bonds should be added in arriving at the net value of the estate, to determine the percentage payable on the share of any beneficiary."

The expression "Aggregate value", as used in the early Ontario legislation, has been the subject of considerable litigation. The first Succession Duty Act in that province was passed in 1892. Under that Act, estates of less than \$100,000.00 passing to children were wholly exempt from taxation. In *Attorney-General for Ontario v. Lee*, 9 O.L.R. 9, it was held that in establishing the "aggregate value" of the property of a deceased person under the 1897 Act, the value of the land of the deceased, where such land is encumbered or mortgaged, is to be regarded, and not merely the value of the deceased's equity of redemption therein. In *Ross v. The Queen*, 32 O.R. 143; 1 O.L.R. 487; the words "aggregate value" were interpreted as meaning the net value. But the Act of 1901, by introducing a new interpretation of the expression, subject to duty for the first time estates in which, although the net value was under \$100,000, the gross value exceeded that sum. The Statute of 1905 made a very material change. It restored the interpretation of "aggregate value" as defined in *Ross v. The Queen*, and lowered the minimum at which estates might descend to children free of duty.



The present Ontario statute contains the following definitions of the expressions "Aggregate Value," and "Dutiable Value":—

"'Aggregate value' shall, whether the deceased was domiciled within or outside Ontario at the time of his death, mean:

- (a) the fair market value at the date of the death of the deceased of the property wherever situate passing on the death, and
- (b) the value as defined by this Act at the date of death of any disposition wherever made where such disposition was made on or after the 1st day of July, 1892,  
including bonds, debentures, inscribed stock and other securities of the Province of Ontario issued under any Statute of Ontario exempting them from duty, less the debts, encumbrances and other allowances authorized by section 3."

It is provided by section 3 of the statute that "In determining the dutiable value of property passing on the death and of a transmission thereof and of a disposition the fair market value of the property passing on the death and of the property with respect to which there was a disposition shall be taken as at the date of death of the deceased, or at such other times as may be specified by this Act, and allowance shall be made for reasonable funeral expenses, debts and encumbrances, and Surrogate Court fees (not including solicitor's charges) and any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other subject of property liable thereto; but an allowance shall not be made,—

- (a) for any debts incurred by the deceased or encumbrances created by him unless such debts or encumbrances were created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and to take effect out of his estate; nor

- (b) for any debt in respect whereof there is a right to reimbursement from any other estate or person unless such reimbursement cannot be obtained; nor
- (c) more than once for the same debt or encumbrance charged upon different portions of the estate; nor
- (d) save as aforesaid, for the expense of the administration of the estate or the execution of any trust created by the will of the deceased or by any instrument made by him in his lifetime; nor
- (e) for any debt or encumbrance, or portion thereof, which, by due process of law, cannot be realized out of the property; nor
- (f) for any wages, salary or other remuneration due by the deceased to any member of his family, except such part as the Treasurer may, in his discretion, deem reasonable or proper; nor
- (g) for any part of any debt which would otherwise be allowed under this section not actually and *bona fide* paid or intended to be paid."

*Nova Scotia*.:—The Nova Scotia Act defines "aggregate value" and "dutiable value" as follows:—

"The expression 'aggregate value' means the value of all the property passing on the death of the deceased, including the value of property so passing and situate out of Nova Scotia. In determining the aggregate value of property the fair market value shall be taken as at the date of the death of the deceased of all property passing on his death, including the value of property situate out of Nova Scotia, and a deduction or allowance shall be made of the deductions and allowances hereinafter mentioned in respect of dutiable value."

"The expression 'dutiable value' means the value of property subject to duty. In determining the dutiable value of property the fair market value shall be taken as at the date of the death of the deceased of property subject to duty, and a deduction shall be made for reasonable funeral expenses, debts and encumbrances, and for fees of any Probate Court

in Nova Scotia (not including solicitors' charges or probate, death, estate, inheritance or succession duty or tax or other like duty or tax); but a deduction shall not be made,— (Here follows particulars of the debts and expenses for which no allowance is made similar to the items mentioned in clauses (a), (b), (c), and (d) of section 3 of the Ontario Act), and adding,—

- (e) for any rate or tax whatsoever (other than income tax imposed under the authority of the Parliament of Canada) imposed outside of Nova Scotia, or for any liability for the payment of any such rate or tax or for any penalty imposed by reason of the failure to pay any such rate or tax, or any part thereof, or for failure to make or file any rate or tax return or proper rate or tax return or for any other act or default in relation to the imposition or payment of any such rate or tax, or the making of returns in connection therewith.'

The Nova Scotia statute provides for proportionate allowance of debts where the deceased was domiciled outside of the province. Subsections (2) and (3) of section 6 of the statute provides as follows:—

6.—(2) The said deductions shall be made from the value of only those portions of the property out of which the said funeral expenses, debts and encumbrances and fees of any Probate Court in Nova Scotia are payable respectively.

(3) If any property passing on the death of any person and situate out of Nova Scotia is liable for all or any or part of any of the following, namely, the said funeral expenses, debts and encumbrances, and fees of any Probate Court in Nova Scotia and the pecuniary legacies and residuary legacies or in case of intestacy the share of the next of kin, and if any property so passing and situate in Nova Scotia is also so liable, then in determining the distributable value of property, a due proportionate part of such funeral expenses, debts and encumbrances and fees of any Probate Court in Nova Scotia and legacies or share respectively shall be deemed to be payable out of the property situate in Nova Scotia and liable as aforesaid.

**Prince Edward Island:**—The definitions of “aggregate value” and “dutiable value” contained in the Prince Edward Island statute are similar to those given in the Nova Scotia Act, except that in connection with the matter of allowances there is no reference to solicitors’ charges, nor to class (e) of the deductions stated to be not allowable in Nova Scotia.

**New Brunswick:**—“‘Net value’ means the aggregate value of the property of the deceased wherever situate and whether within or without the province passing on his death, after allowances to the extent and in the manner authorized by this Act are deducted therefrom.”

“‘Dutiable value’ with reference to the property passing to a beneficiary or to the beneficial interest of any person means the value of the property or of the interest in the property of the deceased passing to that person after exemptions and allowances to the extent and in the manner authorized by this Act are deducted therefrom.”

“In determining the net value of the property of the deceased, and, subject to the other provisions of this Act, in determining the dutiable value of the beneficial interest of any person therein, the value shall be taken as at the date of the death of the deceased, and allowance shall be made for,—

- (a) reasonable funeral expenses;
- (b) Probate Court fees and Proctor’s fees on procuring Letters Testamentary or Letters of Administration but not for other charges of the Solicitor; and
- (c) the debts of and the encumbrances on the property of the deceased.

“Any debt or encumbrance for which an allowance is made shall be deducted from the value of that part of the property on which it is charged (if any), and otherwise from that portion of the aggregate value of the property available for the payment of the debts of the deceased.”

The classes of debts for which no allowance is made are similar to those mentioned in connection with the Nova Scotia Act save that class (e) is omitted.

*Manitoba*.—"Net value" means the aggregate value of the property of a deceased person, wherever situate and whether within or without the Province, passing on his death, less the allowances authorized by this Act."

"'Dutiable value' with reference to a beneficial interest means the value of the interest in the property of a deceased person passing on his death to a person, after the exemptions are deducted therefrom and the allowances authorized by this Act are apportioned thereto and deducted therefrom, such value to be taken as at the date of the death unless otherwise provided by this Act."

"In determining the net value of the property of a deceased person, the value shall be taken as at the date of the death and allowance shall be made for

- (a) the debts of and the encumbrances on the property of the deceased;
- (b) funeral expenses not exceeding four hundred dollars; and
- (c) Surrogate Court fees, not including solicitors' charges."

"Any debt or encumbrance for which an allowance is made shall be deducted from that portion of the aggregate value of the property available for the debts of the deceased."

The classes of debts for which no allowance is made in Manitoba are similar to those mentioned in the Nova Scotia Act, except that class (e) is omitted, and certain other classes are added as follows:—

"(1) for a debt incurred or encumbrance created by or on behalf of the deceased, any of the proceeds of which were used for the benefit of the deceased in acquiring securities of the province issued under any statute which exempts them from duty;

"(2) For a debt or encumbrance which the personal representative of the deceased is not compelled at law to pay, but this paragraph shall not apply to an encumbrance on property to the extent of the value of the property."

*Saskatchewan*:—"Aggregate value" means the fair actual value of the property after the debts, encumbrances and other allowances authorized by section 6 are deducted therefrom."

"Dutiable value" means the aggregate value less the exemptions authorized by this Act."

"For the purpose of determining the aggregate value of property passing on the death of any person and the rate of duty payable, the value of the property situate outside of Saskatchewan shall be included."

"In determining the dutiable value of property or the value of a beneficial interest in property or the value of a succession to property the fair actual value shall be taken as at the date of the death of the deceased, and allowance shall be made for reasonable funeral expenses, debts and encumbrances and Surrogate Court fees (not including solicitor's charges); and any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other subject of property liable thereto."

The classes of debts for which no allowance is made in Saskatchewan are similar to those mentioned in clauses (a), (b), (c), (d), and (e) of section 3 of the Ontario Act.

Provision is made in Saskatchewan for a limited allowance for debts, where the deceased was not domiciled in the province during his lifetime, in the following terms:—

§.—(2) Where the deceased is domiciled outside of Saskatchewan at the time of his death an allowance shall not be made, in determining the dutiable value of property in Saskatchewan, for debts due from the deceased to persons resident out of Saskatchewan (unless contracted to be paid in Saskatchewan or charged on property situate within Saskatchewan), except to the extent to which it is shown to the satisfaction of the Attorney-General that the real and personal property of the deceased situate out of Saskatchewan is insufficient for their payment.

A similar provision is contained in the statutes of New Brunswick, Manitoba, Alberta and the Yukon Territory.

**Alberta:**—The statutory provisions in Alberta with regard to the terms "net value" and "dutiable value" are similar to those contained in the Manitoba statute. Moreover, in both these provinces additional rules are applicable in determining dutiable value, as follows:—

- “(a) Where the property situate within the province forms part only of the estate of the deceased, the other part of which is situate without the province, the allowances shall be deducted from the value of the property within the province to the extent only of an amount which bears the same ratio to the value of the property within the province as the value of that property bears to the value of the whole estate.
- “(b) Where the personal property passing is situate without the province and forms part only of the estate of a deceased, the other part of which is situate within the province, each legacy payable out of the mass of the estate shall be apportioned between the respective parts of the estate in the same proportion as the allowances are to be deducted therefrom.
- “(c) Where part of the property of a deceased consists of securities of the province which by any statute of the province are exempt from duty, the allowances which may be deducted pursuant to this Act shall be apportioned *pro rata* between that part of the property and the remainder of the property and the amount which may be deducted from the remainder of the property shall be its proportionate share only of the total allowances attributable thereto.
- “(d) Where part of the property of the deceased consists of securities of the province which by any

statute of the province are exempt from duty, then for the purposes of this Act every bequest or gift shall be apportioned *pro rata* between that part of the property which consists of such securities as aforesaid which are not specifically bequeathed by the will of the deceased or disposed of by gift by him in his lifetime and the remainder of the property."

The additional rules (a) and (b) above quoted are also contained in the statutes of New Brunswick and the Yukon Territory.

Rule (a) has been amended in Alberta by Chapter 13 of the Statutes of 1935, and now reads as follows:—

"(a) Where the property situate within the province forms part only of an estate of a deceased, the other part of which is situate without the province, the allowances which may be made in respect of the value of the property within the province shall be that proportion of all allowances which might be made if all the estate were within the province which the value of the property within the province bears to the value of the whole estate."

*British Columbia*:—" 'Net value' means the value of all the property of the deceased, wherever situate, both within and without the province after the allowances authorized by section 3 are deducted therefrom."

" 'Dutiable value', with reference to the property or the transmission of a beneficial interest in property passing to any person in respect of which duty is imposed by this Act, means the value of the property or the beneficial interest in property of the deceased passing to that person after the allowances authorized by section 3 are deducted therefrom."

"In determining the net value of the property of the deceased, or the dutiable value of property or of the transmission of a beneficial interest in property, the fair market value shall be taken as at the date of the death of the de-



ceased, but subject, in the case of any future or contingent estate, income, or interest, to the provisions of section 19, and allowance shall be made for reasonable funeral expenses, debts and encumbrances; and any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other subject of property liable thereto."

The classes of debts for which no allowance is made in British Columbia are similar to those mentioned in the Nova Scotia Act, except that class (e) is omitted.

*Yukon Territory*:—The statutory provisions in the Yukon Territory with regard to the terms "Net value" and "Dutiable value" are similar to those contained in the Manitoba Act.

*Quebec*:—" 'Aggregate value' shall mean the real value of the property after deducting therefrom the debts and charges existing at the time of the death and allowed, but no allowance shall be made,—

"(a) for any debt in respect whereof there is a right to reimburse from any other person or estate;

"(b) for any debt or any part thereof which, considering its nature or the circumstances under which it is created or claimed, is deemed by the collector to be excessive or fraudulent; the declarant may however appeal from the decision of the collector to the Quebec Public Service Commission by simple petition directed to the secretary thereof within ten days of the decision of the collector; and the collector shall have the right, with the approval of the Provincial Treasurer, to refer such matter to the said Commission."

The expressions "aggregate value" and "net value", as used in the provincial succession duty enactments, have been the subject of considerable litigation.

*In re Succession Duty Act; Royal Trust Co. (Van Horne Estate) v. Minister of Finance for British Columbia*

(1921), 3 W.W.R. 749; (1922), 1 A.C. 87; 91 L.J.P.C. 8, reversing (1920), 3 W.W.R. 600; 61 S.C.R. 127; same case below *sub nom. In re Succession Duty Act; In re Van Horne Estate* (1919), 3 W.W.R. 76; 27 B.C.R. 269, and (1919), 1 W.W.R. 1101.

By section 5 of the British Columbia Succession Duty Act, 1907 (being chapter 217 of the Revised Statutes of 1911), all property of a deceased person, whether domiciled in the province or not, situate within the province, was made subject to succession duty, the rate of duty being fixed by sections 7 to 9 of the Act. Section 7 of the Act as amended by the Succession Duty Act of 1915 provides as follows:—

7. When the net value of the property of the deceased exceeds twenty-five thousand dollars and passes under a will, intestacy or otherwise, either in whole or in part to or for the use of the father, mother, husband, wife, child, daughter-in-law or son-in-law of the deceased, all property situate within the province or so much thereof as so passes (as the case may be) shall be subject to duty as follows:—

- (a) Where the net value exceeds twenty-five thousand dollars but does not exceed one hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars.
- (b) Where the net value exceeds one hundred thousand dollars but does not exceed two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars and two dollars and fifty cents for every one hundred dollars above the one hundred thousand dollars.
- (c) Where the net value exceeds two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars, two dollars and fifty cents for every one hundred dollars of the second one hundred thousand dollars and five dollars for every hundred dollars above the two hundred thousand dollars.

It was held that the expression "net value", as used in paragraphs (a), (b) and (c) of section 7, was properly and naturally to be referred to the property described in the

words immediately preceding those paragraphs, that is to say, the property within the province passing to the near relatives mentioned in the section, and the sums of \$100,000 and \$200,000 afterwards referred to were to be treated as constituent parts of that net value; and the rate of taxation was therefore to be ascertained with reference to the net value of the property within the province only, and not the total net value of the estate wherever situated.

The law in British Columbia was amended subsequent to the decision of the Privy Council in the *Van Horne* case, and that decision does not govern the law in its present form.

*In re Tilt Estate* (1933). 1 W.W.R. 694.

In this case, the deceased died on 24th November, 1932, domiciled in Manitoba, and left to her children the whole of her estate valued at \$37,353.91. The rate of 2.22 per cent. charged by the Provincial Treasurer was challenged by the estate.

The question turned on section 8 of the Act, and Schedule "A" therein referred to. Subsection (1) of section 8 provided that "Where the aggregate value of the property exceeds \$5,000.00 and any property passes either in whole or part to or for the benefit of the father, mother, husband, wife or child of the deceased, the same or so much thereof as so passes shall be subject to a duty at the rate set out in the second column of the table of rates in Schedule "A" opposite the group in the first column of said table in which is arranged the property of the deceased when classified for the purposes of the said table on the basis of its aggregate value."

Appearing in the second column of the Schedule, under the heading "Percentages on shares passing to father, mother, brother, husband, wife or child of the deceased, was the following:

"1.50% plus 6/100 of 1% for each full \$1,000 by which the aggregate value of property of deceased exceeds \$25,000."

It was held that, as the "plus" portion of the rate was uniformly fixed at 6/100 of 1% for each \$1,000, this demonstrated that both the basic rate and the "plus" rate were applicable to the whole estate, and were to be treated as one estate.

It was accordingly decided that the rate applicable to the estate was 2.22% as charged by the Provincial Treasurer.

*In re Jones*, 28 B.C.R. 481.

This was an appeal by the Minister of Finance from the decision of Macdonald, J., on a question as to the interpretation of section 9 of the British Columbia Succession Duty Act as amended in 1917. One Thomas D. Jones died in Nanaimo on the 3rd June, 1919, leaving an estate of \$60,-287.12, all left to his wife and children, except two legacies, one of \$936.05 to the wife of a deceased nephew, and the other of \$1,896.03 to his brother-in-law, both being strangers in blood to the deceased.

Macdonald, J., held that the words "net value" in the section applied to the amount bequeathed under the section, and not to the whole estate, and, the amounts bequeathed being under \$5,000, they were exempt from taxation.

On appeal, it was held, reversing this decision, that the words "net value" in section 9 of the Act, applied to the whole estate, and were not limited to the amount passing under the section, and that the amounts passing under the two legacies were accordingly liable to the tax.

### Interest in Expectancy.

The statutes usually provide that the succession duty in respect of an interest in expectancy may be accounted for and paid in one of three ways, namely,—

- (a) The duty may be paid within the statutory time limit applicable to the duty on the other property passing on the death. When so paid, the duty is on the value of such interest ascertained as at the date of the death of the deceased.

- (b) With the consent in writing of the responsible Minister, the duty may be paid after the time so limited and before such interest comes into possession. If such consent is given, the duty is calculated on a value not less in any event than the value of such interest in expectancy ascertained as at the date when the duty is paid, and no deduction is made by reason of duty paid or payable on any prior estate, income or interest.
- (c) The duty on any interest in expectancy, if not sooner paid, is payable forthwith when such interest comes into possession, in which case the duty is on the value ascertained as at the date of coming into possession, and no deduction is made by reason of duty paid or payable on any prior estate income or interest.

The statutes of Ontario, New Brunswick, and Alberta provide that the duty on any interest in expectancy, if not sooner paid, is due forthwith when such interest comes into possession, and is payable within three months thereafter.

Where the deceased was entitled to an interest in expectancy, it is necessary to ascertain its value at the time of the death in order that such value may be aggregated with the other property passing on the death, and the rate of duty applicable to such other property thus ascertained. If the executor or administrator elects to pay the succession duty at once on the interest in expectancy, the value as determined at the death will be taken as the basis of calculation.

If it is decided to defer payment, the rate of duty applicable to an interest in expectancy may be increased in case the value of the property increases in the interval. Such value is aggregated with the rest of the property passing on the death, and, in the result, it may happen that a higher rate of duty is payable in that event on the interest in expectancy than upon the other property.

There is no statutory rule applicable to the valuation of reversions which fall into possession after the termination of a prior life estate. Where the property is bringing in an annual income equivalent to what is usually obtained from invested moneys, it is the usual practice to value the life interest as if the annual income were an annuity. Deducting the value of the life interest thus obtained from the capital value of the property, the difference is regarded as the present value of the reversion. If the property is not yielding an income on the usual investment basis, it is the customary practice to regard the property theoretically as capable of earning a certain rate of interest for taxation purposes, and to value the life interest and the reversion accordingly. The accuracy of this practice has been questioned, so far as the Province of Alberta is concerned, in the judgment delivered by the Supreme Court of Alberta *In re Hamilton Estate* (1935), 1 W.W.R. 549. This was an appeal from the decision of the provincial auditor as to the value of the interest of beneficiaries to whom an unstated income was bequeathed. The net value of the estate was \$85,957.20, and it was agreed that the actual income therefrom did not exceed \$2,300.00 per annum. Out of that revenue, the will of the deceased directed that an income be paid to Fred Hamilton. The remainder of the revenue was directed to be paid out in equal shares to six nephews and nieces. The provincial auditor fixed the value of Fred Hamilton's income at \$18,322.00, and this amount was accepted by the executor. The value of the remainder of the revenue was fixed by the auditor at \$47,299.15. He arrived at this amount by fixing the total revenue of the estate at 5 per cent. of the net value, basing this method of calculation on section 30 of the Act.

It was held that section 30 gave no authority to find an annual income by a calculation of 5 per cent. on the net value of the estate. Its sole purpose was to find the present value of a known fixed annual income. It was further held that the income to be divided between the six beneficiaries

did not exceed \$1,100.00 and that the value of that income was \$16,795.16.

The rule that the value of the interest when it falls into possession is the value for assessment, if accounting for the duty has not previously been made, is illustrated by the decision in *Re Colonel Eyre, deceased*, (1907), 1 K.B. 331; 76 L.J.K.B. 227; 96 L.T. 236.

Among the properties passing on the death of Colonel Eyre was an interest in expectancy consisting of a reversion under the will of his father, who died in 1889, expectant on the death of his sister, M. Eyre.

The executors of Colonel Eyre elected to postpone accounting for the duty on the reversion until it should fall into possession. In February, 1906, the interest fell into possession. The interest was valued at the death of the Colonel at approximately £14,000.00. When it fell into possession, the value was more than double that figure. The Inland Revenue Commissioners in England claimed estate duty on the reversion, based upon its value when it came into possession. The executors resisted this claim, and contended that duty was only payable on the value as at the death. Judgment was given for the Crown.

"An interest in expectancy" is usually defined in the provincial statutes as including an estate in remainder or reversion and every other future interest, whether vested or contingent. It does not, however, include the reversion expectant upon the determination of a lease, and the value of such property for succession duty purposes is its fair market value at the death.

It is improper to value a contingent reversion at a merely nominal figure. It must be valued at its fair market value. See *Lord Advocate v. Pringle* (1878), 5 S.S.C. 4th series 912; 15 S.L.R. 624.

The following decisions were rendered under the Ontario Acts of 1892 and 1897, since repealed, but are still of interest as illustrating the methods of computation applicable to interests in expectancy.

*Attorney-General v. Cameron*, 27 O.R. 380; 28 O.R. 571.

This was a special case stated for the opinion of the Court in an action brought by the Attorney-General for Ontario against the executors of the will of Alexander Cameron, deceased, for the purpose of ascertaining the amount of succession duty payable. The amount of property left by the testator was valued at \$556,069.67. By his will and codicil, the testator devised and bequeathed all his property to his executors in trust for sale, with power in the meanwhile and until sales should be effected to lease the real estate for terms not exceeding ten years. Out of the proceeds of the sales of the estate and the accumulations of capital and income not required for expenses of management and payment of annuities, the testator directed the executors to form a fund, and out of the income of the estate growing at the time of his death, and of the said fund when formed, he directed the executors to pay certain annuities. He also bequeathed to several employees of Cameron and Curry small sums should they be in that employment, every Christmas. He further bequeathed to the trustees for his grandchild, Kate Torrance, \$500 per annum until she attained twenty-one years of age or married, upon her marriage \$2,000, and upon attaining twenty-one \$15,000. He made similar bequests to his two grandchildren, sons of his daughter, Mrs. Cartwright. He made the same provision for any children that his son the defendant Cameron should have. At the expiration of twenty-one years from the death of the testator he directed the defendants to divide his estate into three parts, one part to be paid to his grandchild Torrance, or her issue; one to his grandchildren Cartwright, or their issue; and one to his grandchild or children Cameron, if any. If any grandchildren of any family failed, the share to be divided among his children and grandchildren as his executors should think best.

Rose, J., held that it was proper to assess duty on the whole estate at the time of the testator's death, including both the present and future estates or interests; the payment of duty on the future estates being deferred until they should become estates in possession or enjoyment, and the



duty then payable was not to be the duty fixed at the time of the death, but that assessed upon the value of such estates or interests at the time of the right of possession or enjoyment accrued. In cases where there was present actual enjoyment of the annuities provided by the testator, the duty thereon was to be assessed on the cash value at the time of death. Duty was not payable on the deferred annuities until such time as such annuities actually commenced.

It was further held, that the duty payable on the capital was deferred until the final distribution thereof, which was the time when the moneys under the directions of the will reached the hands of the persons who should become entitled thereto, and that the duty then payable would be on the amount then actually distributed, whether increased by accumulations, or by the rise in value of lands or securities, or decreased by loss.

In the course of his judgment, Rose, J., discussed the methods which in his opinion, should be followed in assessing duty upon a reversionary interest when it came into possession. He says: "It occurs to me in this way: Assuming that a parcel of land was directed to be sold when the period of distribution should arrive, and the proceeds distributed, the value of such parcel of land would be either the same as at the time of the death of the testator or greater or less, according to the then market value. If in addition to the proceeds of the land, the rents were directed to be accumulated and divided at such period of distribution, such rents, it seems to me, should bear their portion of the succession duty in the hands of the persons to whom they were directed to be paid. And so, if a sum of money was directed to be put out at interest and the interest accumulated and divided with the principal, it would appear reasonably clear that the sum distributed pursuant to such direction would be the principal plus the interest unless the sum had been lessened by loss, for the person receiving is the one to pay the duty."

*Atty.-Gen. for Ontario v. The Toronto General Trusts Corporation*, 50 L.R. 216.

A testator by his will devised his estate to a corporate trustee, upon trust to collect the income and apply it in their discretion for the benefit of his children and his grandchildren for the period of twenty-one years after his death; and to pay over to the beneficiaries the whole income without accumulation, for the period between the end of the twenty-one years and the death of the last surviving child when the corpus was to be divided. It was held that there was a plainly marked out period in the future, not sooner than twenty-one years, when the corpus of the estate was to be divided; with a prior interest for life or years according to the event in fact, during which the trustee standing in *loco parentis* was entitled to the present income of the property until the time accrued for the division of the corpus, and that the income only was presently liable to the payment of the succession duty.

Succession duty is usually declared to be due and payable at the death of the deceased, and if payment is not made within a limited time thereafter, interest becomes payable as from the date of death.

In *Wilson v. Minister of Finance* (1928), 3 D.L.R. 253; 40 B.C.R. 14; it was held that under the Succession Duty Act, R.S.B.C. 1924, ch. 244, duty is payable on contingent or future estates within two years from the date of death, and that interest on such duty could not be ordered before the expiration of the time limit for payment.

### Commutation of Duty.

Notwithstanding the duty on any future or contingent estate, income or interest, may not be payable until the right of possession or enjoyment accrues the executor or administrator may usually agree with the responsible Minister for commutation thereof. Provision for such commutation is made by the statutes of New Brunswick, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, and the Yukon Territory.

The provision in the New Brunswick Act is as follows:—

“Notwithstanding that the duty is not payable under this section until the time when the right of possession or actual enjoyment accrues, any person having an interest in the property, or the person who has the custody or control of the property may, with the consent of the Minister, commute the duty which would or might but for the commutation become payable in respect of the interest in expectancy for a certain sum to be presently payable, and for determining that sum, the Minister shall cause a present value to be set upon the duty, regard being had to the contingencies affecting the liability to and the rate and amount of such duty and interest; and on the receipt of the sum so determined the Minister shall give a certificate of discharge from such duty.”

It is also provided that,—

“(a) For the purpose of any commutation under this section the rate of interest shall be five per centum per annum; and

“(b) Where the duty on any interest in expectancy has been commuted and paid under the provisions of this section before the interest in expectancy falls into possession, the duty so paid shall be charged on the interest in expectancy, and shall be repaid with interest at the rate of five per centum per annum to the person who has paid the same by the person entitled to the interest in expectancy at the time when that interest comes into possession.”

In most of the other provinces it is provided that the repayment of the duty paid on the interest in expectancy is to be with interest at the rate of four per centum per annum.

The British Columbia statute provides that the certificate of discharge given upon payment of the commuted duty shall not discharge any person from any duty, except a bona fide purchaser for value without notice, in case of fraud or failure to disclose material facts.

The provision for commutation relates to cases where the duty in respect of the interest in expectancy was not paid at the time of payment of the duty on the other properties passing on the death, but it is afterwards desired to have the liability disposed of before the interest falls into possession.

The Minister has an absolute discretion in the matter of commutation, and may refuse to commute, particularly where it is believed that, in view of the state of health of the life tenant, there is a strong possibility that his interest may come to an end.

If the Minister agrees to commute, the person accounting for the duty must disclose the present value of the property, and assessment is made on the basis of that value upon the assumption that its future value will be the same. The necessary discount is made from the duty as thus ascertained by reference to the life expectancy of the life tenant.

#### Composition of Succession Duty.

It is provided by subsection (7) of section 15 of the Ontario Succession Duty Act that,—

“Where it appears to the Treasurer that, by reason of the number of deaths on which property has passed, or of the complicated or contingent nature of the interests of different persons in property passing on the death it is difficult to ascertain exactly the rate or amount of duty payable in respect of any property or any interest therein or on the transmission thereof, or so to ascertain the same without undue expense in proportion to the value of the property or interest, the Treasurer on the application of any person accountable for any duty thereon, or on the transmission thereof, and upon his furnishing all the information in his power respecting the value of the property and the several interests therein, and other circumstances of the case, may, by way of composition for all or any duty payable in respect of the property or interest, and the various interests therein, or any of them, or on the transmission thereof, assess such

sum on the value of the property or interest, as having regard to the circumstances appears proper, and may accept payment of the sum so assessed in full discharge of all claims for duty in respect of such property or interest, or on the transmission thereof, and shall give a certificate of discharge accordingly."

A similar provision with regard to the compounding of claims for duty in consideration of a single payment is also contained in the statutes of Nova Scotia, New Brunswick, Prince Edward Island, Manitoba, Saskatchewan, Alberta, and the Yukon Territory.

#### **Valuation of Interests in Expectancy.**

The statutory provisions regarding the methods to be employed in valuing interests in expectancy are as follows—

**Ontario:**—Section 12 of the Ontario Act provides that the value of every annuity, term of years, life estate, income or other estate, and every interest in expectancy, shall be determined by such rule, method and standards of mortality and of value and at such rate of interest as the Lieutenant-Governor in Council may deem fit.

**Nova Scotia:**—By subsection (4) of section 13 of the Nova Scotia Act it is provided that the value of every annuity, term of years, life estate, income or other estate, and of every interest in expectancy, shall be determined by such rule, method and standard of mortality and of value as from time to time the Treasurer thinks fit; provided, however, that the rate of interest to be taken for the purpose of determining such value shall be four per centum per annum.

The table of mortality in use in Nova Scotia at present is The Healthy Male Table of Mortality of the Institute of Actuaries of Great Britain and Ireland computed at four per centum per annum.

**New Brunswick:**—The statutory provision in the New Brunswick Act is similar to that in force in Nova Scotia,

except that the rate of interest is five per centum per annum. The Carlisle Mortality Tables are used.

*Prince Edward Island*:—The statutory provision is the same as that in force in *Nova Scotia*.

*Manitoba*:—The statutory provision is similar in terms to section 12 of the Ontario Act. The tables of mortality in use consist of Oakes' Tables of Compound Interest with interest at five per centum per annum, together with the table referred to in subsection (2) of section 7 of Chapter 43 of the Statutes of Manitoba, 1923.

*Saskatchewan*:—The statutory provision is similar to that in force in *Nova Scotia*. The table of mortality in use is the American Experience Table, with interest at four per centum per annum.

*Alberta*:—The statutory provision follows that in force in Ontario, but specific mention is made of the rate of interest as being five per centum per annum. The tables of mortality in use are special tables worked out by reference to the practice followed by the leading life insurance companies.

*British Columbia*:—Section 18 of the British Columbia Act provides that "the value of every future or contingent or limited estate, income or interest shall, for the purposes of this Act, be determined according to Schedule B, except that the rate of interest to be used in computing the present value of all future interests and contingencies shall be six per centum per annum; and the Minister shall determine the value of any future or contingent or limited estate, income, or interest upon the facts as ascertained by him or as contained in the report of a Commissioner."

The tables of mortality in use in British Columbia are similar to those made use of by the Mutual Life Insurance Company.

*Yukon Territory*:—The statutory provision is similar to that in force in *Nova Scotia*, except that the Minister has power to determine the rate of interest.

**Quebec:**—The tables of mortality used in Quebec in calculating life interests and annuities are those of the Sun Life Assurance Company of Canada.

### **Deductions.**

In arriving at the value for succession duty purposes, the statutes usually provide that deduction from the gross value of the property may be taken for reasonable funeral expenses, debts and encumbrances.

The Quebec Act provides that no allowance can be claimed in respect of the following classes of debts, namely:—

- (a) For any debt in respect whereof there is a right to reimbursement from any other person or estate;
- (b) For any debt or any part thereof which, considering its nature or the circumstances under which it is created or claimed, is deemed by the collector to be excessive or fraudulent; the declarant may however appeal from the decision of the collector to the Quebec Public Service Commission by simple petition directed to the secretary thereof within ten days of the decision of the collector; and the collector shall have the right, with the approval of the Provincial Treasurer, to refer such matter to the said Commission.

The statutes of the other provinces uniformly provide for disallowance in respect of the following classes of debts, namely:—

- (a) Debts incurred or encumbrances created by the deceased which were not incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit;
- (b) Any debt in respect whereof there is a right to reimbursement from some other person or estate, unless such reimbursement cannot be obtained;

- (c) More than once for the same debt or encumbrance charged upon different portions of the estate;
- (d) Expenses of administration of the estate except the expenses of procuring letters probate or letters of administration, not including solicitor's fees;
- (e) Expenses of the execution of any trust.

In Nova Scotia no allowance is made "for any rate or tax whatsoever (other than income tax imposed under the authority of the Parliament of Canada) imposed outside of Nova Scotia, or for any liability for the payment of any such rate or tax or for any penalty imposed by reason of the failure to pay any such rate or tax, or any part thereof, or for failure to make or file any rate or tax return or proper rate or tax return or for any other act or default in relation to the imposition or payment of any such rate or tax, or the making of returns in connection therewith."

The Provinces of Ontario and Saskatchewan disallow any debt or encumbrance, or portion thereof, which, by due process of law, cannot be realized out of the property. The statutes of Manitoba and the Yukon Territory provide that no allowance shall be made "for a debt or encumbrance which the personal representative of the deceased is not compelled at law to pay, but this paragraph shall not apply to an encumbrance on property to the extent of the value of the property."

Debts incurred in the purchase of tax free bonds are not allowed in Manitoba and Alberta.

No allowance is made in Ontario,—

- (a) for any wages, salary or other remuneration due by the deceased to any member of his family, except such part as the Treasurer may, in his discretion, deem reasonable or proper;
- (b) for any part of any debt which would otherwise be allowed not actually and *bona fide* paid or intended to be paid.



### Funeral Expenses.

The statutes limit the allowance for funeral expenses to what is reasonable, having regard to the deceased's condition in life. In the Province of Manitoba there is a limit of four hundred dollars in the amount which can be allowed. In British Columbia the limit is five hundred dollars. Funeral expenses do not include the cost of mourning apparel, or the erection of a tombstone. *Goldstein v. Salvation Army Assurance Society* (1917), 2 K.B. 291; 86 L.J.K.B. 793; 117 L.T. 63; *Bridge v. Brown* (1843), 2 Y. & C.C.C. 181.

### Debts and Encumbrances.

In the absence of statutory provision to the contrary, such as that contained in the statutes of Ontario, Manitoba, Saskatchewan, and the Yukon Territory, the debts are deductible from property which is not legally liable for the satisfaction thereof in order to determine the rate and amount of succession duty payable.

*The King v. Meibach* (1927), 2 D.L.R. 1020; 22 A.L.R. 482.

In this case, it was held that where an estate consists of certain assets and certain insurance and the total liabilities exceed the total of the assets and insurance there is no net value of the estate and no succession duty is payable in respect thereof, although the insurance is not liable for the debts of the estate and passes intact to the beneficiary.

In *Fraser et al. v. Provincial Secretary-Treasurer of New Brunswick* (1935), 1 D.L.R. 625, the Supreme Court of Canada held that under the provisions of the New Brunswick Succession Duty Act, 1927, the debts, encumbrances and expenses, mentioned in the Act, may be deducted from the value of all the property passing on the death of the testator including both the assets liable for the payment of debts, encumbrances and expenses, and the property not so liable.

The debts and encumbrances for which allowance can be claimed are not necessarily those created by the deceased. If created by his predecessors in title, they can be deducted if unpaid at his death.

Sums *bona fide* paid by executors for the purpose of settling claims against them as such, must be considered debts for the purpose of administration and of ascertaining the amount of succession duty.

*Ross v. The Queen*, 32 O.R. 143; 1 O.L.R. 147.

This was a special case submitted for the opinion of the Court upon certain questions arising on a petition of right presented to the Government of Ontario by the executors and executrix of the last will of Aaron Ross, deceased, and by the residuary legatees thereunder. The petition set out that Ross died on the 11th day of July, A.D. 1896, and that the inventory filed showed the estate as amounting in value to \$104,115.31, this value not making any allowance in respect of certain liabilities of the deceased in connection with the Farmers Loan and Savings Company. Prior to April, 1898, this company had become insolvent, and the executors and executrix were obliged to pay certain amounts to the liquidator. It was held that the amounts paid were properly deductible for the purpose of ascertaining the succession duty, and that the executors were entitled to recover back from the Crown the amount of duty overpaid.

#### **Bona Fide for Full Consideration in Money or Money's Worth.**

Where debts or encumbrances have been incurred or created by the deceased, they cannot be deducted unless created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and to take effect out of his interest. As a consequence of this provision, voluntary debts cannot be deducted, as, for example, promissory notes given without consideration, and charitable subscriptions promised, but not paid.

*Lord Advocate v. Gunning's Trustees* (1902), 39 S.L.R. 534; 9 S.L.T. 405.

In order to endow certain educational or charitable institutions the deceased entered into certain bonds to pay capital sums of money to them. By one of these bonds, the deceased had bound himself to the University of Edinburgh to provide a capital sum of £5,000 for the purpose of paying examination prizes, with interest at four per cent. per annum. It was held by the Lord Ordinary that this was not a debt incurred "for full consideration in money or money's worth, wholly for the deceased's own use and benefit."

**Marriage is Not a Consideration in Money's Worth.**

*Lord Advocate v. Alexander's Trustees* (1905), 42 S.L.R. 307; 12 S.L.T. 682.

By marriage contract A. bound himself, his heirs and successors, to pay to the trustees for the benefit of his wife if she survived him, (a) a yearly annuity of £1,500, (b) a sum of £2,000 in lieu of furniture, and (c) a sum for *interim aliment*. He also covenanted to pay a capital sum of £30,000 to the trustees of the settlement made on the marriage of his son. It was held that on the death of A., these obligations entered into by him for the benefit of his wife and son were not debts incurred for full consideration in money or money's worth.

**For Any Debt in Respect Whereof There is a Right of Reimbursement.**

This provision prohibits allowance in respect of debts due from deceased persons as guarantors or sureties, unless it can be shown conclusively that the debts have been paid out of the property of the deceased and cannot be recovered from the principal debtor.

*In re Succession Duty Act and Sproule* (1924), 1 W.W.R. 1025.

The deceased's estate was subject to a claim, not admitted, on promissory notes, made by the deceased as surety for another person. The British Columbia Court of Appeal held that, while it is proper to postpone final settlement of the executor's liability for succession duty as to the sum represented by such alleged indebtedness, an order dealing with the matter should postpone the date of payment to a time certain, and should contain a term directing payment of succession duty upon the sum should it be determined that the estate was not liable for the claim, and a further term that, if the estate was liable the executor should pay duty upon his claim against the principal debtor.

The statutes of Ontario and Saskatchewan provide that any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto. The statutes of Nova Scotia, Prince Edward Island, and British Columbia provide that deduction or allowance shall be made from the value of only those portions of the property out of which the funeral expenses, debts and encumbrances, and Probate Court fees are payable respectively. The Alberta Act provides that any debt or encumbrance for which an allowance is made shall be deducted from the value of that part of the property on which it is charged (if any), and otherwise from that portion of the aggregate value of that part of the property available for the payment of the debts of the deceased. A similar provision is contained in the statutes of Manitoba and the Yukon Territory.

As a result of these provisions, debts charged against any particular property are deductible out of that property, but otherwise the debts are deductible out of the general estate available for the payment of debts.

For example, in the case of mortgaged land, the amount due on the mortgage must be deducted from the value of the land. If the mortgage debt exceeds the value of the land, then the excess may apparently be deducted against the personal estate of the deceased.

It is noteworthy that certain of the provincial insurance statutes enact that where the insured designates as beneficiary or beneficiaries, a member or members of the class of preferred beneficiaries, a trust is created in favour of the designated beneficiary or beneficiaries, and that, so long as any of the class of preferred beneficiaries remains, the insurance money, or such part thereof as is or has been apportioned to a preferred beneficiary, shall not be subject to the control of the insured, or of his creditors, or form part of the estate of the insured. In view of this provision, the debts incurred or created by the deceased are apparently not deductible against insurance moneys payable to preferred beneficiaries.

#### **Allowance for Debts Where Deceased Domiciled Outside the Province.**

The Quebec statute provides that in case the property transmitted forms only part of an estate, the other part of which is actually situate without the province, the debts and charges existing at the time of the death shall be deducted from the value of the property in the province only in proportion which such property bears to the value of the whole estate.

Subsection (2) of section 6 of the Saskatchewan Act provides that where the deceased is domiciled outside of Saskatchewan at the time of his death an allowance shall not be made, in determining the dutiable value of property in Saskatchewan, for debts due from the deceased to persons resident out of Saskatchewan (unless contracted to be paid in Saskatchewan or charged on property situate within Saskatchewan), except to the extent to which it is shown to the satisfaction of the Attorney-General that the real and personal property of the deceased situate outside of Saskatchewan at the time of his death is insufficient for their payment.

A similar provision is contained in the statutes of New Brunswick, Manitoba, Alberta, and the Yukon Territory.

The Nova Scotia statute provides that if any property passing on the death of any person and situate out of Nova Scotia is liable for all or any part of the allowances, and if any property so passing and situate in Nova Scotia is also so liable, then in determining the dutiable value of property a due proportionate part of such allowances shall be deemed to be payable out of the property situate in Nova Scotia and liable to duty accordingly.

The Prince Edward Island statute contains a similar provision.

The statutes of Ontario and British Columbia make no special mention in regard to the allowance to be made for debts in assessing property within the province belonging to persons dying domiciled elsewhere. In assessing such property, however, the general practice in these provinces is to make allowance for debts on a proportionate basis. Encumbrances on real estate are deducted from the property which they affect, and the other debts are apportioned in the ratio that the value of the property in the province bears to the value of the entire estate. It has been asserted that this allowance of debts on a proportionate basis is improper, for the following reasons, namely:—

(a) In *Henty v. The Queen* (1896), A.C. 567, the Judicial Committee of the Privy Council considered a similar statutory provision respecting allowance to be made for debts, and, in discussing it, Lord Watson made the following comment: "The subsection is obviously framed in general and comprehensive terms, in order to meet the exigencies of every case that can come within its scope, but it does not, in their Lordships' opinion, necessarily follow that the expressions real and personal estate, and secured and unsecured debts must in any case mean the whole estate of the deceased, and his whole debts secured and unsecured. Real and personal estate must, in their opinion, signify all assets within the colony, which alone are chargeable with duty according to the decision of this Board in

*Blackwood v. Reg.*, 8 App. Cas. 82, and debts of the deceased, secured or unsecured, must refer, not to the whole debts of the deceased, but to such debts as are properly chargeable upon these colonial assets in assessing them for duty. Were these expressions otherwise interpreted, the whole purpose of subsection 2 would be defeated. The debts falling to be deducted, in assessing duty, from Victorian assets will necessarily vary according to circumstances. When the deceased died domiciled in Victoria, and had no estate outside the colony, the whole of his property, real and personal, and the whole of his debts, which in that case are domiciled with him, must be disclosed in the statement. When the deceased died domiciled in another country, but had assets situate in Victoria, his Victorian assets must be fully stated, and from these are to be deducted, for the purpose of ascertaining the amount liable to colonial duty, only those debts which are Victorian."

(b) In *Rex v. Loritt* (1912), 1 A.C. 212, the Privy Council held that the New Brunswick statute, in imposing a duty upon all property situate within the province, where the deceased was domiciled elsewhere, assimilated the tax to a probate duty, and that the tax was really part of the price paid by the representatives of the deceased for the collection or local administration of taxable property within the province. Most of the other provincial enactments are doubtless capable of a similar interpretation as applied to property within the province forming part of the assets of persons dying domiciled elsewhere. It is argued that proportionate allowance in respect of debts in such cases would frequently result in making the outside property contribute to the expense of probate in the province, and accordingly that the taxation is *ultra vires* of the legislature.

See *Reg. v. Commissioners of Stamps and Taxes, Ostell's case*, 18 L.J.N.S.Q.B. 201; 13 Jur. 624.

(c) The judgment of the Privy Council in *Royal Trust Company v. Minister of Finance of British Columbia*, 61 D.L.R. 194, appears to favour the view that proportionate

methods of calculation cannot be adopted in the absence of direct statutory sanction.

(d) While the Courts of the several States of the United States of America have in some cases applied the proportionate method in inheritance taxation, this method is not universally followed. For example, in *Matter of King*, 71 App. Div. 581; 76 Supp. 220; affd. 172 N.Y. 616; 64 N.E. 1122; the deceased, who died domiciled outside New York State, left debts in that State which exceeded his assets there. The court said: "Assuming, but not deciding, that the decedent had a property interest in the assets of the firm in this state which is subject to taxation, we find it impossible to get away from the conclusion that as against such property the right exists to deduct the debts due to creditors in this State. In the present instance, upon the conceded facts, this would leave no balance subject to taxation. A tax on personal property of a non-resident is one which the State imposes based upon its dominion over the property situate within its territory, and as such property is liable to be appropriated for the payment of debts therein, we fail to see upon what principle the latter can be entirely disregarded. Here it is conceded that the liabilities of the firm in this State exhaust its assets in this State."

Section 10 of the British Columbia Act in force in 1924 provided that "where part only of the property is situate within the province, the rate applicable for the purpose of determining the duty imposed by this Act in respect of any property of the deceased situate within the Province shall be the like rate as would be applicable to that property if all the property of the deceased were situate within the Province." It has been held by the British Columbia Court of Appeal that this provision justified the application of proportionate methods of taxation in that province.

See *In re the Succession Duty Act; In re Hecht* (1924), 1 W.W.R. 1153.



The deceased, who was domiciled outside British Columbia, left personal property of over \$1,000,000 in value, of which about \$10,000 was in British Columbia. It was held that under the British Columbia Succession Duty Act, the duty payable should be determined as follows: From the gross value of the estate deduct the debts wherever incurred to ascertain the net amount upon which duty may be levied; then, applying section 7 of the Act, charge  $1\frac{1}{2}$  per cent. on the first \$100,000,  $2\frac{1}{2}$  per cent. on the second \$100,000, and 5 per cent. on the balance; and of the sum thus ascertained the \$10,000 within the province is charged with its proportion which is taken by the province.

#### **Deduction of Duty Paid Elsewhere.**

Subsection (3) of section 3 of the British Columbia Act provides that "where in respect of any succession in this Province any succession duty is payable in any part of the British Dominions other than British Columbia, or in a foreign country by the law of that country, in respect of which no allowance is made under section 9, and the Minister is satisfied that by reason of such succession any duty is payable there in respect of it, he may allow the amount of that duty to be deducted from the value of the succession in this Province."

Section 6 of the Nova Scotia statute, however, provides that no allowance shall be made for any rate or tax whatsoever (other than income tax imposed under the authority of the Parliament of Canada) imposed outside of Nova Scotia.

The practice of making no allowance in respect of taxes or duties paid elsewhere also obtains in the other provinces, so far as the determination of the dutiable value of the property passing on the death is concerned.

#### **Reciprocal Allowance.**

Double succession duties frequently become payable where the testator or intestate dies domiciled in one province or country, and leaves property in another. Reciprocal

provisions are contained in a number of the statutes whereby the Lieutenant-Governor in Council may, by order, afford certain relief from this double liability. These provisions are as follows:—

*Ontario:*

8.—(1) Notwithstanding anything in this Act contained where the Treasurer is satisfied that in any part of the British Dominions other than Ontario, or in any foreign country to which this section applies, any estate, legacy or succession duty is paid on property with respect to which there is a transmission within Ontario which is dutiable according to the provisions of this Act, a deduction on account of the duty paid on such property as aforesaid shall be made from the duty payable to Ontario with respect to the transmission thereof; provided that any such deduction shall be made only as to such part of the British Dominions or as to such foreign country to which the Lieutenant-Governor in Council shall have extended the provisions of this section, and such deduction shall be in accordance with such terms or understanding as the Treasurer may deem proper to make or have with such part of the British Dominions or such foreign country; provided also that the Lieutenant-Governor in Council may revoke any order-in-council made under this section.

(2) In determining for the purpose of this section only whether property is locally situate in Great Britain or in the Province of Ontario, the law of England shall be followed.

(3) Notwithstanding anything in this Act contained, the duty imposed by this Act in respect of personal property (except tangible personal property having an actual situs in Ontario) shall not be payable (a) if the transferor at the time of his death was a resident of a Province of Canada which at the time of his death did not impose a transfer tax, death duty or succession duty of any character in respect of personal property of residents of Ontario (except tangible personal property having an actual situs in such province) or (b) if the laws of the province of residence of the transferor at the time of his death contained a reciprocal exemption provision under which non-residents were exempted from transfer taxes, succession duties or death taxes of every character in respect of personal property (except tangible personal property having an actual situs therein), provided the province of residence of such non-residents allowed a similar exemption to residents of the province of residence of such transferor, and provided further that this subsection shall apply only with respect to intangible personal property which, but for this subsection, would be charge-

able with duty both in the province of residence of the transferor and the province where such intangible personal property is situate, and, for the purposes of this section, "intangible personal property" shall mean incorporeal property including money, deposits in bank, mortgages, debts, receivables, shares of stock, bonds, notes, credits, evidences of any interest in property and evidences of debt.

Orders-in-Council, extending the provisions of subsection (1) of section 8 of the Ontario Act as to the allowances for duty paid elsewhere, have been passed with respect to the following parts of the British Empire, namely:—

*Great Britain:* (allowance to be made when death took place on or after January 12th, 1906).

*British Columbia:* (allowance to be made when death took place on or after July 2nd, 1908).

*Nova Scotia:* (allowance to be made when death took place on or after September 23rd, 1907).

*Alberta:* (allowance to be made when death took place on or after April 16th, 1928).

Reciprocal arrangements were entered into by Ontario under subsection (3) of section 8 with the province of Prince Edward Island, these arrangements becoming effective on April 10th, 1930.

The provisions regarding reciprocity in the Quebec Act are set forth in section 36 as follows:—

36.—1. When it is shown, to the satisfaction of the Provincial Treasurer, that in the United Kingdom or in any part of the British Dominions other than the Province of Quebec, or in any foreign country, any succession duty whatever is levied on account of any property that is also subject to duty according to the law of this province, he may then make, for the duty so paid, an allowance from the duties payable in the province with respect to the same property.

Such allowance, however, may be made only if the Lieutenant-Governor in Council has extended the provisions of this section to the United Kingdom or such British Dominion or such foreign country, after an understanding has been arrived at that similar treatment will be accorded by the United Kingdom or such British Dominion or foreign country to the Province of Quebec.

The Lieutenant-Governor in Council may also amend or revoke any order-in-council made under the provisions of this section.

2. For the purposes of carrying out the provisions of this section, the Lieutenant-Governor in Council may decree that the law which shall govern, in this province, the situs of property shall be that in force in the country which the order-in-council shall indicate.

The only reciprocal arrangements now existing between the Province of Quebec and other countries in order to avoid double taxation for succession duty purposes are those entered into with Great Britain, Northern Ireland, Trinidad and Tobago.

*Nova Scotia*:—Subsection (8) of section 8 of the Nova Scotia Act provides that succession duty shall not be leviable or payable:

On the property which passed on the death of the deceased and which is brought or sent into Nova Scotia after his death if any succession legacy or death duty or tax has been paid on such property elsewhere than in Nova Scotia and such duty or tax is equal to or greater than the duty payable on property in this province, but if the duty or tax so paid elsewhere is less than the duty payable on property in this province than on the property upon which such duty or tax has been paid elsewhere only the difference between the duty payable under this chapter and the duty or tax so paid elsewhere shall be payable.

It will be observed that the terms of this provision are not dependent in any manner upon there being a reciprocal arrangement in force elsewhere.

*New Brunswick*:—Section 35 of the New Brunswick Act provides for reciprocal arrangements in the following terms:—

35.—(1) In the case of property situate without the province in respect of any beneficial interest in which any person is liable for the payment of duty imposed by this Act, if there has been paid in respect of that property any estate, succession or legacy duty or tax elsewhere than in the province, an allowance shall be made pursuant to this section; and the person liable for the payment of the duty as imposed by this Act shall be liable only for the payment of the amount, if any, by which the duty so imposed exceeds the duty or tax so paid elsewhere.

(2) The allowance shall be made only—

- (a) as to any province, British Dominion, or possession, territory, state or country where an allowance is made for the succession duty paid under this Act on property situate within the province passing on the death of a person domiciled without the province; and
- (b) if the Governor-in-Council by order-in-council has extended the provisions of subsection (1) to apply to that province, British Dominion or possession, territory, state or country.

(3) The Governor-in-Council may revoke any such order where it appears that the law of the province, British Dominion or possession, territory, state or country referred to in the order has been so altered that it would not authorize the making of an order hereunder.

(4) For the conjoint purpose of this section and of section 20 of The Finance Act, 1894, of the United Kingdom, the local situation of any property shall be determined in accordance with the law in force for the time being in Great Britain and Northern Ireland, as the case may require.

(5) Notwithstanding anything in this Act contained, the tax imposed by this Act in respect of personal property (except tangible personal property having an actual situs in the province) shall not be payable—

- (a) if the deceased was, at the time of his death, resident of a province of Canada which did not impose a transfer tax, death tax or succession duty of any character in respect of personal property of residents of this province (except tangible personal property having an actual situs in such other province); or
- (b) if the laws of the province of residence of the deceased at the time of his death contained at that time a reciprocal provision under which non-residents were exempted from transfer taxes, succession duties or death taxes of every character in respect of personal property (except tangible personal property having an actual situs therein), provided the province of residence of such non-residents allowed a similar exemption to residents of the province of residence of such deceased, provided that this subsection shall apply only with respect to intangible personal property, which, but for this subsection, would be chargeable with duty both in the province of residence of the deceased and the province where such intangible personal property is situate.

- (6) For the purpose of this section—
- (a) the word "country" shall include the United Kingdom, a British Dominion, colony or possession and a foreign country or a political division or possession of a foreign country;
  - (b) "intangible personal property" shall mean incorporeal property, including money, deposits in banks, mortgages, debts, receivables, shares of stocks, bonds, notes, credits, evidences of any interest in property and evidences of debt;
  - (c) all other personal property shall be considered tangible personal property.
- (7) Subsections (5) and (6) of this section shall come into force, with respect to any country, upon a date to be fixed by Proclamation of the Governor-in-Council.

Under and by virtue of subsections 2 (b) and 7 of section 35 of the New Brunswick Act an Order-in-Council was passed on 22nd November, 1934, whereby subsection 1 of the section was made to apply, on and after 27th March, 1934, to any Province of the Dominion of Canada which made a like allowance in respect of duty paid to the Province of New Brunswick, and whereby subsections 5 and 6 of section 35 were declared to be in force on and after 27th March, 1934, in respect of all the provinces of Canada. The provinces of Ontario and Alberta have since entered into reciprocal arrangements with New Brunswick.

*Prince Edward Island:*—Subsection (6) of section 8 of the Prince Edward Island Act is similar in terms to subsection (8) of section 8 of the Nova Scotia Act. The Act also contains a provision similar in terms to subsections (5) and (6) of section 35 of the New Brunswick Act.

*Manitoba:*—Section 36 of the Manitoba Act provides as follows:—

- (1) Where the Minister is satisfied that in a foreign jurisdiction, an estate, legacy or succession duty is paid in respect of property locally situate without the province which is also chargeable with duty in the province, an allowance for the duty so paid shall be made from the amount payable to the province with respect to the same property; but such an allowance shall be made only

as to a foreign jurisdiction as to which the Lieutenant-Governor in Council has extended the provisions of this section and shall be in accordance with such terms or understanding as the Minister makes with the foreign jurisdiction.

(2) In determining, for the purpose of this section only, whether property is locally situate in Great Britain and Northern Ireland or in the province, the law in force in Great Britain and Northern Ireland shall be followed.

The above provision has not been extended to any foreign jurisdiction, and Manitoba has accordingly no reciprocal arrangements in respect of succession duty.

*Saskatchewan*.—Section 23 of the Saskatchewan Act is similar to section 35 of the New Brunswick Act. Reciprocal arrangements have been entered into by Saskatchewan with Great Britain and Northern Ireland.

*Alberta*.—Section 40 of the Alberta Act contains a provision regarding reciprocal arrangements similar to section 36 of the Manitoba Act. Under this provision reciprocal arrangements have been entered into by Alberta with Great Britain and Northern Ireland, and with the provinces of Ontario, New Brunswick and British Columbia.

*British Columbia*.—Section 9 of the British Columbia Act provides as follows:—

(1) In the case of personal property situate without the province in respect of the transmission of any beneficial interest in which any person is liable for the payment of duty imposed by this Act, if there has been paid in respect of that property any estate, succession, or legacy duty or tax elsewhere than in the province, an allowance may be made therefor; and the person liable for the payment of the duty so imposed by this Act shall be liable only for the payment of the amount (if any) by which the duty so imposed exceeds the duty or tax so paid elsewhere.

(2) The allowance under subsection (1) shall be made only as to any country, State, or British province or possession where an allowance is made for the succession duty paid under this Act on property situate in this province passing on the death of any person domiciled in such country, State, or British province or possession, and the Lieutenant-Governor in Council, by Order.

has extended the provisions of this Act as to such allowance by this province so as to apply to such country, State, or British province or possession.

(3) The Lieutenant-Governor in Council may, by Order, revoke any such order, where it appears that the law of such country, State, British province or possession has been so altered that it would not authorize the making of an order hereunder.

(4) In the case of any other province of the Dominion the Order provided for in subsection (2) may be made whether or not an allowance is made in that other province for the succession duty paid under this Act on property situate in this province passing on the death of any person domiciled in that other province, and any Order so made may be revoked by the Lieutenant-Governor in Council.

Reciprocal arrangements have been entered into by British Columbia with Great Britain, British Guiana, and the provinces of Ontario, New Brunswick and Alberta.

*Yukon Territory*.—Section 35 of the Yukon Territory Act is in the same terms as section 36 of the Manitoba Act.

### Annuities.

Subsections (1) and (2) of section 14 of the Ontario Act make special provision as to how the duty applicable to an annuity, or income, whether for life or otherwise, shall be payable. These provisions are as follows:—

14.—(1) The duty imposed by this Act, unless otherwise herein provided, shall be due at the death of the deceased and payable within six months thereafter, and, if the same, or any part thereof, is paid within that period, no interest shall be charged or collected thereon, but if not so paid, interest at the rate of six per centum per annum from the death of the deceased shall be charged and collected upon the amount remaining from time to time unpaid, . . . ; provided that in the case of an annuity, or income, whether for life or otherwise, the duty, if any, unless otherwise herein provided, shall be payable in four equal consecutive annual instalments, one year, two years, three years, and four years, respectively, after the death of the deceased, and for non-payment, when payable, interest at the rate of six per centum per annum from the respective dates payable until paid shall be charged and collected upon the amounts remaining from time to time unpaid, and, if the annuitant or tenant of income dies before the expiration of



the four-year period provided for in this subsection, the balance of the duties shall be payable by the estate or fund out of which the annuity or income is charged or derived, and such balance shall be payable in the same manner as provided for herein, had the annuitant or tenant of income lived throughout the four-year period, and the same shall be subject to the interest penalty provided for herein.

(2) If before the expiration of the term provided in subsection 1, for the payment of duty on any annuity or income, such annuity or income has ceased or has been reduced under circumstances provided for in the will or settlement directing the payment of such annuity or income, the balance of the duty where the annuity or income has wholly ceased or the duty on the portion which has ceased, shall be payable by the estate or fund on or out of which the annuity or income is charged or derived or which has benefited by its cessation or reduction, and such balance, or the duty on the portion of annuity or income which has ceased, shall be payable in the same manner as is provided for herein had there not been such cessation or reduction, and the same shall be subject to the interest penalty provided for herein: provided that this subsection shall be retroactive to and including the first day of October, 1928, and shall apply, as and when the occasion arises, to estates of persons dying on or after that date.

Section 13 of the Nova Scotia Act provides that the duty payable in respect of any annuity may be paid in four equal consecutive annual instalments, the first of which shall be payable before or on the falling due of the first year's annuity and the three others shall be payable in like manner successively before or on the falling due of the three succeeding years' annuities respectively. It is further provided that if any instalment is not paid when the same is due, interest at the rate of 7 per centum per annum from the date when the same was due shall be charged and collected upon the amount remaining from time to time unpaid until the same is paid, and that if such annuity determines by the death of any person or by other contingency before such instalments have been paid the amount of the instalments remaining unpaid and interest thereon, if any, shall be payable by the estate or fund on or from which the annuity is charged or derived, and shall be and remain a first lien thereon until paid.

Provision for the payment of duty on annuities by instalments is also contained in the statutes of Prince Edward Island, New Brunswick, Manitoba, Saskatchewan, Alberta, and the Yukon Territory.

A bequest in a will of the interest or income of a fund is not a "legacy given by way of annuity" within the meaning of the Ontario Succession Duty Act, but simply a gift of interest or income.

*Bethune v. The King*, 4 D.L.R. 229; 26 O.L.R. 117; 3 O.W.N. 941; 21 O.W.R. 559.

A petition of right was presented by the executors of John Sweetland, deceased, stating that the Solicitor to the Treasury for Ontario furnished the suppliants a statement showing that the total duty payable amounted to \$8,379.82; that of this amount \$2,139.80 was attributable to duty payable in respect of the annuity of Caroline F. Anderson; that by section 11 of the Ontario Succession Duty Act, 7 Édw. VII., ch. 10, the duty payable upon any legacy given by way of annuity was to be paid in four equal consecutive annual instalments; and that, in the event of the annuitant dying before the expiration of the first four years, payment only of the instalments which fell due before the death of the annuitant should be required. The suppliants paid the entire \$8,137.82. Caroline F. Anderson died on 9th November, A.D. 1909, and the suppliants claimed that, at the time of her decease, the only amount which they were legally liable for was the instalment of \$534.95, and they claimed that they paid to the Treasurer \$1,604.85 in excess of the proper amount payable.

It was held by Falconbridge, C.J., that the benefit conferred by the will upon Mrs. Anderson was not a legacy given by way of annuity, but was simply a gift of interest or income.

It was further held that the payment made by the executors was a voluntary one, not made under a mistake of fact, and that no part of the amount paid could be recovered from the Crown.

## ONTARIO.

The rates of succession duty in Ontario are as follows:—

## CLASS 1.

Exceeds	Aggregate Value	Does not Exceed	plus	Rate	for each full	\$1,000
25,000	\$	50,000	1%,	6/100%	..	..
50,000		75,000	2½%,	4/100%	..	..
75,000		100,000	3½%,	6/100%	..	..
100,000		150,000	5%,	1/100%	..	..
150,000		200,000	5½%,	1/100%	..	..
200,000		300,000	6%,	1/100%	..	2,000
300,000		400,000	6½%,	1/100%	..	..
400,000		500,000	7%,	1/100%	..	..
500,000		600,000	7½%,	1/100%	..	..
600,000		700,000	8%,	1/100%	..	..
700,000		800,000	8½%,	1/100%	..	..
800,000		900,000	9%,	1/100%	..	..
900,000		1,000,000	9½%,	1/100%	..	..
1,000,000		5,000,000	10%,	1/100%	..	10,000
5,000,000			14%,	1/100%	..	..

ONTARIO.

CLASS 1.—(Concluded).

Additional rates where amounts passing to any one person —

Aggregate Value		Rate	plus	2/100% for each full	\$1,000
Exceeds	Does not Exceed				
\$ 50,000	\$ 75,000	1½%	..	..	..
75,000	100,000	2%	..	..	..
100,000	150,000	2½%	..	..	..
150,000	300,000	3%	..	..	..
300,000	400,000	3½%	..	..	..
400,000	500,000	4½%	..	..	2,000
500,000	600,000	5%	..	..	..
600,000	700,000	5½%	..	..	..
700,000	750,000	6½%	..	..	1,000
750,000	800,000	7%	..	..	..
800,000	900,000	7½%	..	..	2,000
900,000	1,000,000	8½%	..	..	..
1,000,000	1,200,000	9%	..	..	4,000
1,200,000	1,400,000	9½%	..	..	..
1,400,000	1,600,000	10%	..	..	..
1,600,000	1,800,000	10½%	..	..	..
1,800,000	2,000,000	11%	..	..	2,000
2,000,000	2,200,000	12%	..	..	..
2,200,000	2,400,000	13%	..	..	..
2,400,000	2,600,000	14%	..	..	..
2,600,000	2,800,000	15%	..	..	..
2,800,000	3,000,000	15%	..	..	..
3,000,000		15%	..	..	..

## ONTARIO.

## CLASS 2.

Aggregate Value	Does not Exceed	plus	Rate	for each full	\$1,000
Exceeds					
\$ 10,000	\$ 30,000	5%	10/100%	"	"
30,000	60,000	7%	10/100%	"	"
60,000	100,000	10%	5/100%	"	"
100,000	200,000	12%	1/100%	"	"
200,000	400,000	13%	1/100%	"	2,000
400,000	600,000	14%	1/100%	"	"
600,000	800,000	15%	1/100%	"	"
800,000	1,000,000	16%	1/100%	"	"
1,000,000		17%	1/100%	"	"

Additional rates where amount passing to one person —

Exceeds	Does not Exceed	plus	Rate	for each full	\$1,000
\$ 10,000	\$ 60,000	2½%	1/100%	"	2,000
60,000	160,000	3%	1/100%	"	4,000
160,000	200,000	3½%	1/100%	"	2,000
200,000	300,000	4%	1/100%	"	1,000
300,000	350,000	4½%	1/100%	"	2,000
350,000	450,000	5%	1/100%	"	2,000
450,000	500,000	5½%	1/100%	"	2,000
500,000	600,000	6%	1/100%	"	"
600,000	700,000	6½%	1/100%	"	"
700,000	800,000	7%	1/100%	"	"
800,000	900,000	7½%	1/100%	"	1,000
900,000	1,000,000	8%	1/100%	"	5,000
1,000,000	1,500,000	9%	1/100%	"	"
1,500,000	2,000,000	10%	1/100%	"	"
2,000,000	2,500,000	11%	1/100%	"	"
2,500,000	3,000,000	12%	1/100%	"	"
3,000,000		13%	1/100%	"	"

# ONTARIO.

## CLASS 3.

Exceeds	Aggregate Value	Does not Exceed	7½%, plus	1/100% for	Rate	for each full
\$		\$				
5,000		10,000	12½%	5/100%	1,000	
10,000		50,000	15½%	5/100%	800	
50,000		100,000	17½%	5/100%	1,000	
100,000		200,000	20%	5/100%	2,000	
200,000		300,000	22½%	5/100%	..	
300,000		400,000	25%	5/100%	..	
400,000		500,000	27½%	5/100%	..	
500,000		600,000	30%	5/100%	..	
600,000		700,000	32½%	5/100%	..	
700,000		800,000	35%	5/100%	..	
800,000					..	

An additional duty by way of surtax of 15% on all duties imposed under the Act is levied and added to and collected with the duties so imposed.

## NOVA SCOTIA.

In the Nova Scotia Act, it is provided that the following duties shall be imposed on property passing on the death, namely:—

Aggregate Value		Rate
Exceeds	Does not Exceed	
\$ 5,000	\$ 10,000	10%
10,000	25,000	12½%
25,000	50,000	14½%
50,000	100,000	16%
100,000	200,000	18%
200,000	300,000	20%
300,000	400,000	22%
400,000	500,000	25%
500,000	600,000	27%
600,000	700,000	28%
700,000	800,000	30%
800,000	1,000,000	31%
1,000,000		32%

It is further provided that in place of these rates, the following rates shall be imposed where the property passes to beneficiaries.

NOVA SCOTIA.  
CLASS 1.

Exceeds	Aggregate Value	Does not Exceed	Rate
\$ 75,000	\$	50,000	2½%
50,000		75,000	3½%
75,000		100,000	4%
100,000		150,000	5½%
150,000		200,000	6½%
200,000		300,000	7%
300,000		350,000	7½%
350,000		400,000	8½%
400,000		500,000	8½%
500,000		600,000	9%
600,000		700,000	9½%
700,000		800,000	10%
800,000		900,000	11%
900,000		1,000,000	12%
1,000,000			



## NOVA SCOTIA.

## CLASS 1.—(Concluded).

Additional rates where the value of property passing to any one person —

Exceeds	Does not Exceed	Rate
\$ 25,000	\$ 50,000	1½%
50,000	75,000	1%
75,000	100,000	1½%
100,000	150,000	2½%
150,000	200,000	3½%
200,000	300,000	3½%
300,000	400,000	4%
400,000	500,000	4½%
500,000	600,000	5%
600,000	700,000	5½%
700,000	750,000	6%
750,000	800,000	6½%
800,000	900,000	7%
900,000	1,000,000	7½%
1,000,000	1,200,000	8%
1,200,000	1,400,000	8½%
1,400,000	1,600,000	9%
1,600,000	1,800,000	9½%
1,800,000	2,000,000	10%
2,000,000	2,200,000	10½%
2,200,000	2,400,000	11%
2,400,000	2,600,000	12%
2,600,000	2,800,000	13%
2,800,000	3,000,000	14%
3,000,000		15%

NOVA SCOTIA.

CLASS 2.

Exceeds	Aggregate Value	Does not Exceed	Rate
\$ 5,000	.	\$ 10,000	5%
10,000		15,000	5½%
15,000		25,000	6%
25,000		50,000	7½%
50,000		75,000	10%
75,000		100,000	11%
100,000		200,000	12½%
200,000		300,000	13%
300,000		400,000	13½%
400,000		500,000	14%
500,000		600,000	14½%
600,000		700,000	15%
700,000		800,000	15½%
800,000		900,000	16%
900,000		1,000,000	16½%
1,000,000			17%

## NOVA SCOTIA.

## CLASS 2.—(Concluded).

Additional rates where the value of property passing to any one person —

Exceeds	Does not Exceed	Rate
\$ 5,000	\$ 10,000	1%
10,000	25,000	1½%
25,000	50,000	2%
50,000	75,000	2½%
75,000	100,000	3%
100,000	200,000	3½%
200,000	300,000	4%
300,000	350,000	4½%
350,000	400,000	5%
400,000	500,000	5½%
500,000	600,000	6%
600,000	700,000	6½%
700,000	800,000	7%
800,000	900,000	7½%
900,000	1,000,000	8%
1,000,000	1,500,000	9%
1,500,000	2,000,000	9½%
2,000,000	2,500,000	10%
2,500,000	3,000,000	11%
3,000,000	3,000,000	12%

An additional duty by way of surtax of 10% on all duties imposed under the Act is levied and added to and collected with the duties so imposed.

NEW BRUNSWICK.

The rates of succession duty in New Brunswick are as follows:—

CLASS 1.

Exceeds	Net Value	Does not Exceed	Rate
\$ 25,000		\$ 50,000	1½%
50,000		100,000	2½%
100,000		150,000	4%
150,000		300,000	5%
300,000		500,000	6%
500,000		750,000	7%
750,000		1,000,000	8½%
1,000,000			10%

Additional rates where the value of property passing to any one person.—

Exceeds	Does not Exceed	Rate
\$ 25,000	\$ 100,000	½%
100,000	200,000	1%
200,000	400,000	1½%
400,000	600,000	2%
600,000	800,000	2½%
800,000	1,000,000	3%
1,000,000	1,200,000	4%
1,200,000		5%

## NEW BRUNSWICK.

## CLASS 2.

Net Value.		Rate
Exceeds	Does not Exceed	
\$ 10,000	\$ 50,000	5%
50,000	100,000	10%
100,000		12½%

Additional rates where the value of property passing to any one person —

Does not Exceed		Rate
Exceeds	Does not Exceed	
\$ 10,000	\$ 50,000	1½%
50,000	100,000	1%
100,000	150,000	1½%
150,000	200,000	2%
200,000	250,000	2½%
250,000	300,000	3%
300,000	350,000	3½%
350,000	400,000	4%
400,000	450,000	4½%
450,000		5%

## CLASS 3.

Net Value.		Rate
Exceeds	Does not Exceed	
\$ 5,000	\$ 50,000	10%
50,000	500,000	15%
500,000	1,000,000	17½%
1,000,000		20%

In estates passing to non-resident beneficiaries, double duties are imposed.  
An additional duty by way of surtax of 10% on all duties imposed under the Act is levied and added to and collected with the duties so imposed.

PRINCE EDWARD ISLAND.

The rates of succession duty in Prince Edward Island are as follows —

CLASS 1.

Exceeds	Aggregate Value	Does not Exceed
\$ 10,000		\$ 20,000
20,000		50,000
50,000		

Rate  
1½%  
2½%  
3½%  
5%

CLASS 2.

\$ 5,000	\$ 10,000
10,000	20,000
20,000	50,000
50,000	1,000,000
1,000,000	

2½%  
5%  
7½%  
10%  
10%, plus 2%  
of the excess

CLASS 3.

\$ 10,000	\$ 10,000
1,000,000	1,000,000

10%  
20%  
10%, plus 3%  
of the excess



MANITOBA.

SCHEDULE "A" — (Continued).

FIRST COLUMN		SECOND COLUMN	THIRD COLUMN	FOURTH COLUMN
Where Net Value of Property of Deceased		Rate in respect of interest passing to father, mother, husband, wife or child of deceased	Rate in respect of interest passing to grandfather, grand-mother, grandchild, son-in-law, daughter-in-law, brother or sister of deceased or any child of such brother or sister	Rate in respect of interest passing to any other persons or beneficiaries
Exceeds	\$25,000 and does not exceed	\$75,000	1 50% plus 6/100 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$25,000	12 00% plus 4/100 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$25,000
"	"	50,000	1 00% plus 2/100 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$50,000	13 00% plus 2/100 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$50,000
"	"	100,000	4 00% plus 1/100 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$100,000	14 00% plus 2/100 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$100,000
"	"	200,000	6 00% plus 2/100 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$200,000	16 00% plus 2/100 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$200,000
"	"	300,000	8 00% plus 2/100 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$300,000	18 00% plus 2/100 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$300,000
"	"	400,000	10 00% plus 2/100 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$400,000	20 00% plus 2/100 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$400,000



## MANITOBA.

## SCHEDULE "A"-(Concluded).

FIRST COLUMN	SECOND COLUMN	THIRD COLUMN	FOURTH COLUMN
Where Net Value of Property of Deceased	Rate in respect of Interest passing to father, mother, husband, wife, or child of deceased	Rate in respect of Interest passing to grandmother, grandfather, brother, sister, or child of each brother or sister	Rate in respect of Interest passing to any other persons or beneficiaries
Exceeds \$500,000 and does not exceed \$600,000	12.00%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$300,000	14.00%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$500,000	22.00%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$500,000
" 600,000 " " " 700,000	12.50%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$600,000	14.50%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$600,000	22.50%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$600,000
" 700,000 " " " 800,000	13.00%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$700,000	15.00%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$700,000	23.00%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$700,000
" 800,000 " " " 900,000	13.50%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$800,000	15.50%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$800,000	23.50%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$800,000
" 900,000 " " " 1,000,000	14.00%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$900,000	16.00%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$900,000	24.00%; plus 1/200 of 1% for each full \$1,000 by which the net value of property of deceased exceeds \$900,000
" 1,000,000 . . . . .	15.00%	17.00%	25.00%

An additional duty by way of surtax of 15% on all duties imposed under the Act is levied and added to and collected with the duties so imposed.

SASKATCHEWAN.

The rates of succession duty in Saskatchewan are as follows —

CLASS 1.

Exceeds	Aggregate Value	Does not Exceed	Rate
\$ 15,000	\$ 25,000	25,000	1%
25,000	50,000	50,000	2%
50,000	75,000	75,000	2½%
75,000	100,000	100,000	3½%
100,000	150,000	150,000	5%
150,000	200,000	200,000	5½%
200,000	300,000	300,000	6%
300,000	350,000	350,000	7%
350,000	400,000	400,000	8%
400,000	500,000	500,000	10%
500,000	600,000	600,000	11%
600,000	700,000	700,000	12%
700,000	800,000	800,000	13%
800,000	900,000	900,000	14%
900,000	1,000,000	1,000,000	15%
1,000,000			16%

## SASKATCHEWAN.

## CLASS 1—(Concluded).

Additional rates where the whole amount passing to any one person:—

Exceeds	Does not Exceed	Rate
\$ 25,000	\$ 50,000	1½%
50,000	75,000	1%
75,000	100,000	1½%
100,000	200,000	2%
200,000	400,000	2½%
400,000	500,000	3%
500,000	600,000	4%
600,000	700,000	5%
700,000	800,000	5½%
800,000	900,000	6%
900,000	1,000,000	6½%
1,000,000	1,400,000	7%
1,400,000	1,800,000	7½%
1,800,000	2,000,000	8%
2,000,000	2,400,000	8½%
2,400,000	2,800,000	9%
2,800,000	3,000,000	9½%
3,000,000		10%

An additional rate of 1% is imposed in estates exceeding \$5,000 where the deceased was not domiciled in the province at the time of death.

An additional rate of 1% is imposed upon beneficiaries not domiciled in the province in estates exceeding \$5,000 in aggregate value.

SASKATCHEWAN.  
CLASS 2.

Exceeds	Aggregate Value	Does not Exceed	Rate
\$	\$	\$	
2,500	5,000	5,000	3%
5,000	10,000	10,000	5%
10,000	15,000	15,000	5½%
15,000	25,000	25,000	6%
25,000	50,000	50,000	7½%
50,000	75,000	75,000	10%
75,000	100,000	100,000	11%
100,000	150,000	150,000	12½%
150,000	200,000	200,000	13%
200,000	250,000	250,000	13½%
250,000	300,000	300,000	14½%
300,000	350,000	350,000	14½%
350,000	400,000	400,000	15%
400,000	500,000	500,000	15½%
500,000	600,000	600,000	16½%
600,000	700,000	700,000	16½%
700,000	800,000	800,000	17%
800,000	900,000	900,000	17½%
900,000	1,000,000	1,000,000	18½%
1,000,000	1,200,000	1,200,000	18½%
1,200,000	1,500,000	1,500,000	19%
1,500,000	2,000,000	2,000,000	19½%
2,000,000	2,500,000	2,500,000	20½%
2,500,000	3,000,000	3,000,000	20½%
3,000,000			21%

## SASKATCHEWAN.

## CLASS 2—(Concluded).

Additional rates where the whole amount passing to any one person —

Exceeds	Does not Exceed	Rate
\$ 5,000	\$ 25,000	1½%
25,000	50,000	1%
50,000	75,000	1½%
75,000	100,000	2½%
100,000	150,000	2½%
150,000	200,000	3%
200,000	300,000	4%
300,000	400,000	5%
400,000	450,000	6%
450,000	750,000	7%
750,000	1,000,000	8%
1,000,000		9%

An additional rate of 1½% is imposed in estates exceeding \$2,500 in aggregate value where the deceased was not domiciled in the province at the time of his death

An additional rate of 1½% is imposed upon beneficiaries not domiciled in the province in estates exceeding \$2,500 in aggregate value.

SASKATCHEWAN.  
CLASS 3.

Exceeds	Aggregate Value	Does not Exceed	Rate
\$ 1,000	\$	2,000	2%
2,000		3,000	4%
3,000		4,000	6%
4,000		5,000	8%
5,000		10,000	10%
10,000		15,000	12%
15,000		25,000	12 1/2%
25,000		50,000	13%
50,000		75,000	14%
75,000		100,000	14 1/2%
100,000		150,000	15%
150,000		200,000	17 1/2%
200,000		300,000	20%
300,000		500,000	22 1/2%
500,000		750,000	25%
750,000		1,000,000	27 1/2%
1,000,000		1,500,000	30%
1,500,000		2,000,000	32%
2,000,000		2,500,000	34%
2,500,000		3,000,000	36%
3,000,000			37%

An additional rate of 2% is imposed in estates exceeding \$1,000 in aggregate value where the deceased was not domiciled in the province at the time of his death

An additional rate of 2% is imposed upon beneficiaries not domiciled in the province in estates exceeding \$1,000 in aggregate value

In estates exceeding \$20,000 in aggregate value, where the deceased died after the first day of May, 1932, an additional duty of 10% on all duties imposed under the Act is levied and added to and collected with the duties so imposed.

## ALBERTA.

TABLE A.

Rate of Duty Payable in respect of any Property having regard to the Net Value of all the Property of the Deceased and the Relationship or Otherwise of the Beneficiary to the Deceased.  
(Sections 9, 12 and 15.)

FIRST COLUMN	SECOND COLUMN	THIRD COLUMN	FOURTH COLUMN	FIFTH COLUMN
Net value of all the property of the deceased	Grandfather, grandfather, father, mother, husband, wife, child, son-in-law or daughter-in-law of the deceased being a resident or resident of the Province	Any person or persons mentioned in Column 2 not being a resident of the Province	Any other lineal ancestor of the deceased, a brother or sister of the deceased or any lineal descendant of such brother or sister or a brother or sister of the father or mother of the deceased, or any lineal descendant of such last mentioned brother or sister	Any other person or beneficiary
Exceeds \$1,000 and does not exceed \$2,000 . . . . .	Nil	Nil	1	2
Exceeds \$2,000 and does not exceed \$3,000 . . . . .	Nil	Nil	2	4
Exceeds \$3,000 and does not exceed \$4,000 . . . . .	Nil	Nil	3	6
Exceeds \$4,000 and does not exceed \$5,000 . . . . .	Nil	Nil	4	8
Exceeds \$5,000 and does not exceed \$10,000 . . . . .	Nil	½	5	10
Exceeds \$10,000 and does not exceed \$15,000 . . . . .	Nil	1	5½	11
Exceeds \$15,000 and does not exceed \$20,000 . . . . .	1% plus 10/100 of 1% for each full \$1,000 by which net value of property of deceased exceeds \$15,000	1% plus 10/100 of 1% for each full \$1,000 by which net value of property of deceased exceeds \$15,000	6% plus 20/100 of 1% for each full \$1,000 by which net value of property of deceased exceeds \$15,000	12% plus 20/100 of 1% for each full \$1,000 by which net value of property of deceased exceeds \$15,000

ALBERTA.  
TABLE A—(Continued).

FIRST COLUMN	SECOND COLUMN	THIRD COLUMN	FOURTH COLUMN	FIFTH COLUMN
	grandfather, grandmother, father, mother, husband, wife, child, son-in-law or daughter-in-law of the deceased being a resident or residents of the Province	Any person or persons mentioned in Column 2 not being a resident or residents of the Province	Any other person or beneficiary	
Net value of all the property of the deceased				
Exceeds \$20,000 and does not exceed \$25,000 . . . . .	$\frac{1}{16}\%$ plus $\frac{10}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$20,000	$\frac{2}{3}\%$ plus $\frac{20}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$20,000	$\frac{7}{8}\%$ plus $\frac{30}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$20,000	$\frac{1}{2}\%$ plus $\frac{20}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$20,000
Exceeds \$25,000 and does not exceed \$30,000 . . . . .	$\frac{2}{3}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$25,000	$\frac{8}{8}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$25,000	$\frac{8}{8}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$25,000	$\frac{1}{2}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$25,000
Exceeds \$30,000 and does not exceed \$75,000 . . . . .	$\frac{3}{8}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$30,000	$\frac{4}{8}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$30,000	$\frac{9}{8}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$30,000	$\frac{1}{2}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$30,000
Exceeds \$75,000 and does not exceed \$100,000 . . . . .	$\frac{4}{8}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$75,000	$\frac{5}{8}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$75,000	$\frac{10}{8}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$75,000	$\frac{1}{2}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$75,000
Exceeds \$100,000 and does not exceed \$150,000 . . . . .	$\frac{5}{8}\%$ plus $\frac{2}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$100,000	$\frac{6}{8}\%$ plus $\frac{2}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$100,000	$\frac{11}{8}\%$ plus $\frac{2}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$100,000	$\frac{1}{2}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$100,000
Exceeds \$150,000 and does not exceed \$200,000 . . . . .	$\frac{6}{8}\%$ plus $\frac{2}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$150,000	$\frac{7}{8}\%$ plus $\frac{2}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$150,000	$\frac{12}{8}\%$ plus $\frac{2}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$150,000	$\frac{1}{2}\%$ plus $\frac{4}{100}$ of $\frac{1}{2}\%$ for each full \$1,000 by which net value of property of deceased exceeds \$150,000





ALBERTA.

TABLE B.

Rates of Additional Duty where the Property Passing to any Beneficiary Exceeds \$25,000 (Sections 10, 13 and 17)

FIRST COLUMN		SECOND COLUMN	THIRD COLUMN
Where the Value of the Property so Passing -		Beneficiary mentioned in Column 2 of Table A	Beneficiary mentioned in Column 4 of Table A
Exceeds	\$25,000 and does not exceed	Nil	1
"	50,000 "	1	1½
"	75,000 "	1½	2
"	100,000 "	2	2½
"	150,000 "	2½	3
"	200,000 "	3	3½
"	300,000 "	3½	4
"	400,000 "	4	4½
"	500,000 "	4½	5
"	600,000 "	5	5½
"	750,000 "	5½	6
"	1,000,000	6	6½

## BRITISH COLUMBIA.

## SCHEDULE C.

## TABLE OF RATES.

(Sections 6, 7.)

FIRST COLUMN	SECOND COLUMN	THIRD COLUMN	FOURTH COLUMN	ADDITIONAL PERCENTAGES.
Classification based on Net Value of Property of Decedent.	Percentages in respect of property passing and transmissions to father, mother, husband, wife, child, grandchild, son-in-law, or daughter-in-law of decedent.	Percentages in respect of property passing and transmissions to grandfather, grandmother, uncle, aunt, cousin, brother, or sister of decedent, or any descendant of his brother or sister.	Percentages in respect of property passing and transmissions to other persons.	
Exceeds \$1,000 and does not exceed \$2,000 .....	Nil	$\frac{1}{2}\%$	1%	...
Exceeds \$2,000 and does not exceed \$3,000 .....	Nil	1%	2%	...
Exceeds \$3,000 and does not exceed \$4,000 .....	Nil	2%	4%	...
Exceeds \$4,000 and does not exceed \$5,000 .....	Nil	3%	6%	...
Exceeds \$5,000 and does not exceed \$10,000 .....	Nil	4%	8%	...
Exceeds \$10,000 and does not exceed \$20,000 .....	Nil	5%	10%	...
Exceeds \$20,000 and does not exceed \$25,000 .....	1% plus $\frac{1}{20}$ of 1% for each full \$1,000 by which the net value of property of decedent exceeds \$25,000	7%	10%	...
Exceeds \$25,000 and does not exceed \$50,000 .....	1% plus $\frac{1}{100}$ of 1% for each full \$1,000 by which the net value of property of decedent exceeds \$25,000	5% plus $\frac{1}{100}$ of 1% for each full \$1,000 by which the net value of property of decedent exceeds \$25,000	10% plus $\frac{1}{100}$ of 1% for each full \$1,000 by which the net value of property of decedent exceeds \$25,000	$\frac{1}{2}\%$
Exceeds \$50,000 and does not exceed \$75,000 .....	1% plus $\frac{1}{100}$ of 1% for each full \$1,000 by which the net value of property of decedent exceeds \$50,000	6% plus $\frac{1}{100}$ of 1% for each full \$1,000 by which the net value of property of decedent exceeds \$50,000	11% plus $\frac{1}{100}$ of 1% for each full \$1,000 by which the net value of property of decedent exceeds \$50,000	1%

BRITISH COLUMBIA.

SCHEDULE C—(Concluded).

FIRST COLUMN	SECOND COLUMN	THIRD COLUMN	FOURTH COLUMN
Classification based on Net Value of Property of Deceased.	Percentages in respect of property passing and transmission to father, mother, son, daughter, wife, husband, and in-law or daughter-in-law of deceased.	Percentages in respect of property passing and transmission to grandfather, grandmother, uncle, aunt, cousin, brother, or sister of deceased, or any descendant of his brother or sister.	Percentages in respect of property passing and transmission to other persons.
Exceeds \$75,000 and does not exceed \$100,000	1½% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$75,000	7% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$75,000	12% plus 4/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$75,000
Exceeds \$100,000 and does not exceed \$150,000.	2% plus 2/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$100,000	4% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$100,000	13% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$100,000
Exceeds \$150,000 and does not exceed \$200,000	3% plus 2/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$150,000	8½% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$150,000	13½% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$150,000
Exceeds \$200,000 and does not exceed \$400,000	4% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$200,000	10% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$200,000	14% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$200,000
Exceeds \$400,000 and does not exceed \$700,000	6% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$400,000	11% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$400,000	10% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$400,000
Exceeds \$700,000 and does not exceed \$1,000,000	8% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$700,000	14% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$700,000	10% plus 1/100 of 1% for each full \$1,000 by which the net value of property if deceased exceeds \$700,000
Exceeds \$1,000,000	12%	15%	20%
	5%	1%	1%

An additional duty by way of surtax of 25% on all duties imposed under the Act is levied and added to and collected with the duties so imposed.

## YUKON TERRITORY.

## SCHEDULE A.

(Sections 8, 10 and 11.)

Percentages Payable on Shares Passing to or for the Use of.

FIRST COLUMN		SECOND COLUMN	THIRD COLUMN	FOURTH COLUMN	
Net Value of the Property of the Deceased, Section 8		Father, mother, husband, wife, child of deceased.	Grandfather, grandmother, grandchild, son-in-law, daughter-in-law, brother or sister of deceased or any child of such brother or sister	Or any other person or beneficiary.	
Exceeding	\$1,000 and not exceeding	\$5,000	Nil	5	10
"	5,000	10,000	Nil	5	10
"	10,000	"	1/2	5 1/2	11
"	15,000	"	1	6	12
"	25,000	"	2	7 1/2	12 1/2
"	50,000	"	2 1/2	10	14
"	75,000	"	3 1/2	11	15
"	100,000	"	4 1/2	11 1/2	16
"	150,000	"	5	12	17 1/2
"	200,000	"	5 1/2	12 1/2	20
"	300,000	"	6 1/2	12 1/2	22 1/2
"	500,000	"	8	12 1/2	25
"	750,000	"	8 1/2	12 1/2	27 1/2
"	1,000,000	"	10	15	30

# RATES OF SUCCESSION DUTY.

## Quebec.

The rates of succession duty in Quebec are as follows:—

### Class 1.

Dutiable Value		Rate
Exceeds	Does not exceed	
	\$10,000	1%
\$10,000	\$50,000	1%, plus 1/25 of 1% for each full \$1,000
\$50,000	\$100,000	1%, plus 1/20 of 1% for each full \$1,000
\$100,000		5%, plus 1/100 of 1% for each full \$1,000

The total rate so obtained shall not exceed 15%, where the aggregate value of the whole estate exceeds one million dollars.

Additional rates where amount passing to any one person:—

Exceeds	Does not exceed.	Rate
	\$50,000	1%
\$50,000	\$300,000	1%, plus 1/100 of 1% for each full \$1,000
\$300,000		3%, plus 1/200 of 1% for each full \$1,000

The total additional rate shall not exceed 10% where the whole amount so passing exceeds \$1,400,000.00.

### Class 2.

Dutiable Value		Rate.
Exceeds.	Does not exceed	
	\$10,000	4%
\$10,000	\$60,000	4%, plus 1/10 of 1% for each full \$1,000
\$60,000		10%, plus 1/100 of 1% for each full \$1,000

The total rate so obtained shall not exceed 20% where the aggregate value of the whole estate exceeds one million dollars.

Additional rates where amount passing to any one person:—

Exceeds.	Does not exceed.	Rate.
	\$100,000	1%, plus 1/25 of 1% for each full \$1,000
\$100,000		5%, plus 1/300 of 1% for each full \$1,000

The total rate so obtained shall not exceed 10% where the whole amount so passing exceeds \$1,500,000.00.

**Class 3.**

Dutiable Value.		Rate.
Exceeds.	Does not exceed.	
	\$100,000	10%, plus 1/10 of 1% for each full \$1,000
\$200,000		20%, plus 1/100 of 1% for each full \$1,000

The total rate so obtained shall not exceed 30% where the aggregate value of the whole estate exceeds one million dollars.

Additional rates where amount passing to one person:—

Exceeds.	Does not exceed.	Rate.
	\$100,000	2%
\$100,000		2%, plus 1/400 of 1% for each full \$1,000

The total rate so obtained shall not exceed 5% where the whole amount so passing exceeds \$1,200,000.00.

**NOTE.**—The above rates apply both to property within the province, and to transmissions within the province.

By an Act respecting the seizin of certain beneficiaries, Revised Statutes of Quebec, 1925, Chapter 30, as amended by 18 Geo. V, ch. 19, and 20 Geo. V, ch. 30, it is provided that no non-resident beneficiary shall be legally seized of property locally situate either within or without the province, forming part of the assets of a person dying domiciled within the province, unless such beneficiary have himself put in possession or obtain legal delivery thereof.

Possession or legal delivery can be had only after payment by the beneficiary of a court fee calculated on the value of the movable property located within the province, at the following rates:—

Where the transfer is  
to members of Class 1 ..... 3%

Where the transfer is  
to collaterals within the heritable degree ..... 9%

Where the transfer is  
to others ..... 15%

## CHAPTER XI.

### Valuation of Property.

The value of property passing on the death for succession duty purposes is the value as it exists at the time of the death of the deceased. There are various expressions used in the statutes in relation to the subject of valuation. In the Province of Quebec the expression used is "real value", and it is provided that,—

- (a) If the property consists of a publicly listed security, the value so listed shall be deemed equivalent to its real value, unless the contrary shall be proved; and
- (b) If the property is a corporeal movable effect usually traded in, the market value thereof shall be deemed equivalent to its real value.

The statutes of Ontario, Nova Scotia, British Columbia, and Prince Edward Island, require duty to be charged on the "fair market value" of the property. In Saskatchewan the "fair actual value" is the basis of assessment. In the statutes of New Brunswick, Manitoba, Alberta, and the Yukon Territory, the word "value" is used without any qualification.

In determining the value of property, the viewpoint of a solvent owner not anxious to sell nor yet holding for a fictitious and merely speculative rise in price is said to be the true criterion. *In re Municipal Act, Gates' Case* (1918), 2 W.W.R. 930.

Regard must be had to the fact that the property has a special value to one particular person, who would be willing to give substantially more than any other person.

*Commissioners of Inland Revenue v. Clay; Commissioners of Inland Revenue v. Buchanan* (1914), 3 K.B. 466; 83 L.J.K.B. 1425; 117 L.T. 484; 30 T.L.R. 573.



Section 25, subsection 1, of the English Finance (1909-10) Act, 1910, provides that "For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from encumbrances, and from any burden, charge or restriction (other than rates or taxes) might be expected to realize."

The fee simple of a house to persons desirous of using it as a private residence was worth not more than £750, and the provisional valuation fixed the gross value at that sum. The house, however, adjoined a nurses' home the trustees of which desired to extend their premises; it was advantageous to them to pay at least £1,000 for the house in question, and they in fact actually purchased it for that amount. On the occasion of the sale the valuation gave £1,000 as the gross value of the house for the purposes of the above subsection. The referee and Scrutton, J., held that on both valuations the gross value ought to be £1,000 and site value £200.

The Court of Appeal affirmed the decision of Scrutton, J., and it was held that on a sale in an "open market" it must be assumed that intending purchasers were aware of the fact that the nurses' home was prepared to give a high price for the house, and that its value would thereby be increased; that it could not be assumed that the nurses' home would only have to make one bid beyond the £750; and that, whether the vendor were in fact a "willing seller" or not, the existence of a willing seller must be assumed for the purposes of the subsection.

Per Cozens-Hardy, M.R.: "'Open market' includes a sale by auction, but it is not confined to that. It would include property publicly announced in the usual way by insertion in the lists of house agents. But it does not necessarily involve the idea of a sale without reserve. I can see no ground for excluding from consideration the fact that the property is so situate that to one or more persons it presents greater attractions than to anybody else."

Per Swindon Eady, L.J.: "A value, ascertained by reference to the amount obtainable in an open market, shews an intention to include every possible purchaser. The market is to be the open market, as distinguished from an offer to a limited class only, such as the members of the family. The market is not necessarily an auction sale. The section means such amount as the land might be expected to realize if offered under conditions enabling every person desirous of purchasing to come in and make an offer, and if proper steps were taken to advertise the property and let all likely purchasers know that the land is in the market for sale."

The fair market value of property is the price that will be obtained if the property is sold in the most advantageous manner.

See *Ellesmere v. Inland Revenue Commissioners* (1918), 2 K.B. 735; 119 L.T. 568; 34 T.L.R. 560.

On the death of the third Earl of Ellesmere, certain properties which passed on his death were sold by the succeeding Earl in one lot for the sum of £68,000, and were subsequently sold in lots by the purchaser. The sum realized on the sub-sales considerably exceeded the price obtained on the original sale. The Inland Revenue Commissioners claimed estate duty on the basis of the prices realized on the sub-sales, and the claim was upheld.

The price realized at a forced sale is not the correct value. It has been suggested that in a time of depression when property is not readily saleable the value should be determined on a normal basis. *Charleston v. Byrne* (1915), 21 B.C. 281; 8 W.W.R. 930; 31 W.L.R. 309; 22 D.L.R. 240. For succession duty purposes, however, it should be remembered that valuations must be determined as at the date of death, and if depressed economic conditions then prevail such conditions must be taken into account.

*Untermeyer v. Attorney-General for British Columbia* (1929), 1 D.L.R. 315; S.C.R. 84; affirming (1928), 3 D.L.R. 311; 39 B.C.R. 533.

In this case, the British Columbia Court of Appeal held that the question of fair market value at date of death is one of fact. The test, however, is not the price which would be realized on the sale of property at a forced sale. The executors should sell the property as a prudent man would do. This decision was affirmed by the Supreme Court of Canada.

In the Court of Appeal, Macdonald, J.A., commented on the question of the value for duty purposes of certain shares of stock in Premier Gold Mining Company, in the following terms:—

"It is conceded that an attempt to dispose of all these shares on the day of death for the market price would fail. They need not, however, be a sale as of the date of death. They simply have to value as of that date. It is enough to surmise a hypothetical sale and in doing so the commissioner may draw deductions from all the evidence not simply accepting as the true test the suggested underwriting scheme by a syndicate, as suggested by the appellant. The question of fair market value at date of death is one of fact. The test, however, is not the amount the shares would bring, if offered for sale on that date without regard to the special conditions making such a sale impossible, or, at all events, difficult.

"As to the meaning of 'fair market value', I do not think a separate meaning should be assigned to each word. It is not 'market value'. If so, it might mean the amount an estate would bring in the open market in exchange for other commodities. The word 'fair' disqualifies that phrase.

"We are told that 'value' does not mean 'worth'; it means what an article will bring in the open market in other commodities on a given day. But quite conceivably on the day of death or for a limited period, from, for example, temporary panic, through false reports, there would be such a general desire to sell that the supply would be over abundant. The normal equation between 'supply' and 'demand' would be temporarily dislocated, and a valuable stock would either be unsaleable or realize very little. Yet the normal value would be there throughout.

"On the other hand, if there was a temporary advance of an unwarranted character the assessor would be obliged to consider it and make a proper allowance. The market quotation, therefore, is not the only element but it is an important element particularly if quotations are maintained at a fairly even level, over a considerable period of time."

In the Supreme Court of Canada, Mignault, J., dealt with the subject of values, as follows:—

"We were favoured by counsel with several suggested definitions of the words 'fair market value'. The dominant word here is evidently 'value', in determining which the price that can be secured on the market is the best guide. It may, perhaps, be open to question whether the expression 'fair' adds anything to the meaning of the words 'market value', except possibly to this extent that the market price must have some consistency and not be the effect of a transient boom or a sudden panic on the market."

The fair market value of property passing on the death must be determined by evidence of what could have been procured for it at the date of the death of the deceased, had it been then offered for sale.

See *Re Marshall*, 20 O.L.R. 116.

This was an appeal by the Treasurer of the Province of Ontario from the judgment of the Judge of the Surrogate Court of Kent finding that the value of the assets of the estate of John H. Marshall, deceased, was \$16,809.09. The appeal was allowed, and the value was increased to \$20,000.

Per Osler, J.A.: "The market value is the fair market value, that is to say, the price which, at the prescribed time, could probably have been obtained or made in the open market. *Belton v. London County Council* (1893), 68 L.T.R. 411. In the face of the clear language of the Act, it cannot be maintained that, if the property at the prescribed date had a fair market value, such value could be reduced by proof of facts which, had they been known, would have made it then less valuable, or by proof of subsequent deterioration. The question remains, what

was its fair market value at the date fixed by the Act? And that question must be solved by evidence of what could then have been procured had it been offered for sale.

In this case the land to be valued was a farm which had a substantial value for agricultural purposes, but was chiefly prized for its supposed oil-producing capacity, not then fully developed, which led the testator to regard it as worth from \$20,000 to \$35,000. It was held that there may be a fair market value for property held for speculative purposes, and that it was the condition of the lands as saleable property, in the sense of the fair market value though of a speculative or conjectural character, that was to be regarded in fixing their dutiable value.

Garrow, J.A., expressed the view that the power of the Surrogate Court Judge was limited to increasing the valuation if, in his opinion, the evidence warranted an increase; he could not reduce the valuation below that of the executor.

Where there is no ready market in sight, the value is determined on the basis of a hypothetical sale.

See *Pearce v. Calgary*, 54 S.C.R. 1; 9 W.W.R. 668.

In this case, the Supreme Court of Canada dealt with an assessment appeal where the statutory provision was that "lands should be assessed at their fair actual value." The parcel of land about which controversy mainly centered was unsubdivided; it could not, as to the greater part of it, be served by a sewerage system or satisfactorily drained for cultivation purposes. As to a great part of it, it was liable to be overflowed yearly, and as to a good deal more of it, periodically. Idington, J., in his judgment, refers to the speculation in real estate in Calgary and its collapse, and says: "Confessedly there is no ready market in sight at the present moment. How can we then determine the fair market value which has to be determined?" Pointing out that there are generally some prudent men in a community who are able to take advantage of a present shrinkage in values, he goes on to say: "I take it that the 'fair market value' meant by the statute above is, when no present market is in

sight and no ordinary means of determining the value, what some such man would be likely to pay or agree to pay in the way of investment for such lands."

Duff, J., (now C.J.C.), says:—" 'Fair market value' does not mean a value measured by future prospects of sale or development, but the purchasing or acquisitive capacity of the various elements of value including those prospects."

*The Bishop of Victoria v. The Corporation of the City of Victoria*, 47 B.C.R. 264.

Here the British Columbia Court of Appeal considered section 212(1) of the Municipal Act providing that "land shall be assessed at its actual value and improvements shall be assessed for the amount of the difference between the actual value of the whole property and the actual value of the land if there were no improvements."

The plaintiff owned two lots in the City of Victoria upon which was erected a well-built parochial school, the cost of construction being \$58,425. For the year 1933 the land was assessed at \$2,900 and the improvements at \$56,000. The Court of Revision reduced the assessment on improvements to \$50,000. On appeal to a judge the assessment on the lots was not changed but that on the improvements was reduced to \$22,100, the learned Judge reciting in the formal order "and the Court being of opinion contrary to the contention of counsel that the words 'actual value' in section 212 of the Municipal Act should be construed to mean the sum which could be realized for the property in question upon a forced sale."

It was held, on appeal, reversing the order of McDonald, J., that "actual value" of land for assessment purposes where no present market is in sight, is what a prudent person attempting to measure the forces at work making for a present shrinkage in value for a time and again likely to arise making for an increase in value, would be likely to agree to pay in way of investment for such lands, with the qualification in reference to the building that in determining 'what some such man would be likely to pay or agree to pay

in way of investment', regard must be had to the likelihood that the 'reversible currents' which affect land causing it at times to depreciate and again to appreciate in value will not, at least to the same degree, affect a building of the character dedicated for all time to academic and moral pursuits, and the matter should be remitted to the Judge below to fix the assessment on the improvements on the principles outlined.

In determining the fair market value of vacant and unimproved property, regard must be had to the present value of the possibilities of subdivision and sale at some future date.

*In re Nairn Estate* (1918), 2 W.W.R. 278; 28 Man. R. 546.

This was an appeal to the Manitoba Court of Appeal by the executors of the estate of Elizabeth C. Nairn, deceased, from a decision of the Judge of the Surrogate Court of St. Boniface. The sole matter in question was the valuation of the real estate of the deceased. The land in question was vacant and unimproved property, part of which was subdivided. It was held that for the purpose of fixing the "fair market value" within the meaning of the Succession Duties Act, ch. 187, R.S.M., 1913, of the vacant and unimproved property in question, the values given by the executors in the inventory filed by them should be accepted. Cameron, J.A., fixed the value with regard to the present value of the possibilities of subdivision and sale at some not unreasonably distant date, and in the absence of a present market, taking as a test a hypothetical sale such as that referred to by Idington, J., in *Pearce v. Calgary*, 9 W.W.R. 668, to some person willing to take advantage of the existing shrinkage in values.

*Re Max Leiser, deceased, and The Succession Duty Act*, 50 B.C.R. 452; (1936), 2 W.W.R. 467.

This was a petition by the executors of Max Leiser, deceased, under section 40 of the Succession Duty Act to have determined the amount of duty payable in respect of certain lands belonging to the estate, and the "fair market

value" of such lands. Evidence was given that the property in question consisted of lots in Victoria City, Oak Bay, Hope, and Langford, all in British Columbia. A number of these lots were vacant, and the buildings erected on others were out of repair and were situated in areas outside the business section of the City of Victoria. Real estate witnesses differed widely as to their value. It was held that, in view of the fact that offers for sale at the prices fixed by the executors had not been taken up, the values given by the executors should be accepted as the "fair market value" at the time of the deceased's death, and the succession duty reckoned accordingly.

In the course of his judgment, Robertson, J., expressed the view that certain decisions dealing with the meaning of the words "actual value" and "fair actual value" did not govern the British Columbia statute in which the words used were "fair market value".

The value for purposes of duty is the value at the death.

See *Lord Advocate v. Marr's Trustees*, 44 S.L.R. 647; 50th Int. Rev. Rep. p. 124.

The property of the deceased included a herd of Short-horn cattle which were valued in the inventory at £9,031. Four months later the herd was sold for almost double that figure, and the Crown claimed additional estate duty on the difference between the two sums. In deciding against this claim, the Lord Ordinary said: "The property must be valued at the date of the death, though it might be imprudent to bring it to the hammer until some months later; the Revenue is not entitled to have a valuation as at the time when the best market might be anticipated, or a valuation based on the result of the actual sale at that period."

Depreciation in the value of property after death cannot be considered in determining the amount of duty payable.

See *Wishart and others (Gellatly's Executors) v. Lord Advocate* (1880), 8 S.S.C. 4th series, 74; 18 S.L.R. 62.

The executors valued certain City of Glasgow Bank Stock in the inventory at £5,738, its then selling price. It



was held that they could not afterwards say that it was of no value, because a few months later the bank went into liquidation.

The executor or administrator must ascertain the value of the property passing within a reasonable time after the death of the deceased.

See *In re Horrex* (1910), Times, March 9, 1910.

Portion of the property of the deceased consisted of the goodwill and leasehold interest in Horrex's Hotel in the Strand, London, England. The executors mentioned the property in the Inland Revenue affidavit, but claimed that they could put no value thereon and that the question of value must be determined later on the sale of the property. Attachment proceedings were taken against the executors to compel them to file a corrective affidavit showing the value of the property, and order was made accordingly. Bray, J., said: "It is impossible to say that a valuation cannot be placed upon the property. Executors must use diligence in order to ascertain the value of the property. They must ascertain it within a reasonable time."

The dividend earning power of a company, and the value of its assets, constitute important factors in determining the value of shares of stock in such company.

See *Re Estate of W. H. Clark, deceased*, 34 W.L.R. 404; 10 W.W.R. 509.

The District Court, Alberta, held that in fixing the value of shares of stock of a company forming part of the estate of a deceased person so as to fix the amount to be paid under the Succession Duties Ordinance (Alberta) the value must be considered from the standpoint of dividend earning power, together with the value of the real estate owned by the company, and the better method of ascertaining the value of such real estate is on the supposition that the company had gone into liquidation and was realizing on its entire assets.

*Attorney-General v. Jameson and others* (1904), 2 I.R. 644; 38 I.L.T. 117; (1905), 2 I.R. 218.

The Crown claimed additional estate duty under the English Finance Act, 1894, in respect of certain shares in John Jameson & Son, Limited, a private company. The articles of association contained restrictive provisions intended to confine the membership of the company to members of the Jameson family. No share was to be transferred to a person not a member so long as any member was willing to purchase the same at a fair value. For this purpose it was provided that certain notice to the company should be given and the fair value was fixed at £100. The Finance Act provided that the principal value on which duties were to be paid was to be estimated at the price which in the opinion of the Commissioners, such property would fetch in the open market at the time of the death of the testator. The shares had been paying dividends at the rate of 20 per cent. The Crown contended that the valuation should be fixed at what the shares would bring in the open market regardless of the restrictions in the articles. The executors, on the other hand, argued that the value fixed by the articles (£100) must govern. The Court of Appeal in Ireland gave judgment in favour of the Crown. It was accordingly held that the principal value is the price which, in the opinion of the Commissioners of Inland Revenue, the shares would fetch if sold in the open market on the terms that the purchaser should be entitled to be registered as the holder of the shares.

Finality in matters relating to valuation of property for purposes of succession duty can only be reached by agreement, or by one of the alternative methods of procedure mentioned in the statutes.

*Rez v. Roach & London Guarantee and Accident Company, Limited* (1919), 3 W.W.R. 56.

The Provincial Treasurer of the Province of Alberta brought action against the defendants on a bond which had been executed under the Succession Duty Ordinance, ch. 5 of 1903 (2nd Sess.), for payment within eighteen months of the death of one John Breckenridge of the succession

duties payable by his estate. The facts were that the executor filed an affidavit of value with inventory pursuant to section 6 of the Ordinance. The Provincial Treasurer sent him a revised valuation of increased amount, and fixing the succession duty. No objection was taken by the executor, and a bond was furnished as required. The executor subsequently requested extensions of time for payment.

The defence to the action on the bond was that by mistake the assets had been greatly over-valued, and the liabilities were subsequently found to be much greater than as set out in the affidavit of value.

It was held that nothing that had taken place had finally decided the valuation; in cases other than other sections 7, 8, 9 and 10, providing for valuation by an appraiser and appeal to a Judge from his decision, finality, other than by agreement, could only be arrived at by an action under sections 11 and 12; the question of values was open under section 12; and the Court fixed values independently of those stated by the executor in his affidavit under section 6 of the Act or by the Provincial Treasurer.

*Blackman v. The King* (1924), S.C.R. 406, reversing *sub nom. In re Grunder Estate and Succession Duty Act* (1924), 1 W.W.R. 161.

The executors of one Edward Grunder had in British Columbia a claim against E. F. Voigt and M. S. Voigt for money lent. In order to institute proceedings against the debtors, who were apparently insolvent, the executors were obliged to obtain letters of ancillary probate of Grunder's will and to secure this probate some arrangement had to be made as to the succession duties. A long correspondence ensued between the solicitor of the executors and different departments of the provincial government, to whom it was represented that the Voigt claim, the only asset of the deceased in British Columbia, was of very doubtful value. Finally the executors obtained ancillary letters of probate on filing an affidavit of value under section 21 of the Act, placing the value of the Voigt claim at \$16,000, and also a

bond, under sections 23 and 24, for the due payment to the Crown of any duty to which the property coming to the hands of the executors might be found liable. The Voigt claim later on proved to be worthless, as a return of *nulla bona* was made on an execution against them. The executors then presented a petition under section 43 of the Succession Duty Act addressed to a Judge of the Supreme Court of British Columbia, setting forth all the facts of the case and asking for an order that no succession duties had become payable by them on the estate of the deceased.

The petition was granted by Mr. Justice Morrison. An appeal from this decision was taken to the Supreme Court of British Columbia, and, by a bare majority, was allowed.

Upon a further appeal to the Supreme Court of Canada, the judgment of Mr. Justice Morrison was restored. It was held that there was nothing in the Act making the affidavit of value and relationship and the accompanying inventories conclusive as to the amount or value of the estate, and that the executors were not bound by the valuation contained therein.

Per Idington, J.: "The learned Chief Justice erred on the basic facts herein in assuming that the amount of duty had been agreed upon."

Per Maclean, J.: "It was urged upon us that there was an agreement between the parties to pay the duty on the footing of an inventory filed. I must say I am unable to discover anything in this case supporting such a view. Every step discloses that there was no agreement such as suggested. . . . The only other basis on which the province could possibly claim this money would be on the ground that the applicant having made this statement of assets and liabilities is now estopped from asserting that it was incorrect, but estoppel does not arise unless the person to whom the representation was made believes the representation and actually acts upon it to his detriment. There could be no suggestion here that the Crown which has taken the bond for the payment of the amount for which the property may be found liable has acted to its detriment.

*Rex v. United States Fidelity and Guaranty Company* (1923), 3 W.W.R. 295; (1923), A.C. 808; 93 L.J.P.C. 26; affirming (1922), 3 W.W.R. 180; 64 S.C.R. 48; and (1922), 1 W.W.R. 389; 30 B.C.R. 440; (1921) 2 W.W.R. 697.

This was a suit upon a bond given to secure the payment of succession duty under the British Columbia Succession Duty Act. Judgment was given by the Supreme Court of the province for the amount that had been determined under section 22 by the Auditor-General as the succession duty, based on the valuation of the estate made by the executor upon application for letters probate, although in the opinion of the Court the property was largely over-valued, the Court holding that it had no jurisdiction to interfere with the amount so fixed.

On appeal to the Court of Appeal for British Columbia, the judgment was upheld. Further appeals by the defendant company to the Supreme Court of Canada and to the Privy Council were dismissed.

Sir Henry Duke, in delivering the judgment of the Privy Council, emphasizes that the succession duty had been determined by agreement between the executor and the Crown. He says: "The powers of section 43 were not invoked at any material time, if a resort to them was at any time open, as of right, to Quagliotti or the appellants. The Auditor-General did, in fact, duly determine the amount of the duty upon the property in question, at the amount at which Quagliotti valued it. There is no valid ground for impugning the validity of the determination. Certainly the too sanguine estimate of Quagliotti afforded no such ground. Some misapprehension arose at the trial as to whether the determination in question had been made after resort to the means provided by sections 29-33, but this is immaterial, for the determination in fact was made by agreement with Quagliotti. It is not open to challenge now by his guarantors."

*The King v. London & Lancashire Guarantee & Accident Company of Canada* (1926), 4 D.L.R. 874; 22 A.L.R. 306; reversing (1926), 3 D.L.R. 555.

In this case it was held by the Alberta Supreme Court, Appellate Division, that in an action upon a bond given for succession duties, the value of the estate as given in the affidavit of value, if accepted by the Crown, and the amount of duty determined thereon, are conclusive and cannot be contested.

In the course of his judgment, Harvey, C.J.A., says:—

“The case strongly relied on by the Crown is *United States Fidelity & Guarantee Company v. The King* (1923), 3 D.L.R. 701. In that case a valuation had been submitted by the executor, which valuation was accepted by the proper officials and the duty determined upon that valuation and a bond given as security for the duty. The action was brought on the bond. It was found at the trial that there had been a gross over-valuation but that the matter had been settled and the amount of the duty finally determined. This view was maintained throughout all the appeals to and including the Judicial Committee.

“I am not quite sure that I fully apprehend the ground of distinction made by the trial Judge between that case and the present one.

“The trial Judge says that if there was an agreement as to the amount of the duties he would be bound by the Privy Council's decision to decide in favour of the Crown. He continues:—“There is no evidence before me that would justify me in forming the conclusion that any consideration had been given to the question as to the correctness of this valuation and, therefore, determining the amount of duty on the part of any officer having power to make an appraisal—ment or form any reasonable conclusion as to the value.’

“Apart, however, from the question whether the fact should not be assumed in the absence of evidence to the contrary, the Judge apparently overlooked the fact that the need for such evidence, if any existed, was met by the admission made at the trial by counsel for the defendants that ‘the assessment, which is already admitted in evidence, was made by a person properly authorized to make it,’ and in

the joint factum of respondent's counsel it is stated that:—  
'It was admitted by counsel for the defendants at the trial that the Collector of Succession Duties had considered the valuations placed upon the property by the executors and being satisfied therewith had determined the duty payable as contemplated by the Act'. This ground of distinction, therefore, apparently does not exist."

*Re Oldfield* (1927), 4 D.L.R. 711; 39 B.C.R. 119.

The testator died on October 15, 1924. Proofs of value and relationship were filed by the executors on February 17, 1925. These were forwarded to the Minister of Finance. The Minister was not satisfied with the values placed upon the deceased's assets by the executors and caused an inquiry to be made concerning them. After considerable delay these values were increased by upwards of \$17,000.00 whereupon the duties were determined by the Minister and a statement thereof delivered to the Registrar, who notified the respondents thereof on January 28, 1926. Interest was claimed by the Minister from the date of the death of the deceased, but respondents objected to that claim and also objected to the claim for succession duties upon the value of lands situate in Manitoba. Objection was also raised to the duties imposed in respect of certain contingent interests. The respondents applied, pursuant to section 35 of the Act to a Judge of the Supreme Court, who determined that interest should be payable not from the date of the death of the deceased, but from January 28, 1926, at which date the statement of the Minister was delivered to the Registrar. The Minister appealed from that decision, and the respondents lodged a cross-appeal for a declaration that interest had not become payable even on January 28, 1926. The appeal and cross-appeal were dismissed, and it was held that where succession duties have been finally assessed on an estate the executors have no longer any excuse for non-payment of the duties, and interest is properly chargeable from the date of the final assessment.

*Re Spence* (1928), 1 D.L.R. 644; 23 A.L.R. 199.

The deceased, who died in England, left a small property in Alberta. On the application for resealing of the English letters, an affidavit was filed showing the value of the Albert property to be \$1,900.00. This valuation was accepted by the succession duties branch, and a statement was rendered claiming duty amounting to \$142.50. The executor subsequently sold the property for \$1,050.00, and claimed that the succession duty should be reduced accordingly, but this claim was refused. The executor thereupon applied to a Judge of the Supreme Court under section 38 of the Alberta Act to have the valuation revised. This section provided that "A Judge shall have jurisdiction upon motion or petition to determine what property is liable to duty under this Act and the amount thereof." It was held that the Supreme Court of Alberta had no jurisdiction under this section to value the property in question for succession duty purposes.

*In re Ryall Estate*, and *In re McMenemy Estate* (1934), 2 W.W.R. 288.

In these matters the question at issue was as to whether or not valuations had been determined by agreement. After the affidavits of value had been filed, the value sworn to was not accepted by the Department of Finance as being correct, whereupon a lengthy correspondence ensued. It was held that the correspondence was not sufficient to establish that a final agreement on values had been reached, and that it would accordingly be necessary to submit evidence on valuations.

### **Valuations of Particular Kinds of Property.**

#### **Real Property.**

In arriving at the value of real property for succession duty purposes the factors generally considered are the character of the property, the annual net revenue it is producing (if any), its location, the condition of the buildings, sales of property in the neighbourhood, the adaptability of the premises, and the economic conditions prevailing at the time of the owner's death.



An actual *bona fide* sale of property in the vicinity of the property to be assessed is good evidence of value. There are times, however, when there is no ready market in sight, and it is then essential to determine the value by reference to a hypothetical sale such as that referred to by Idington, J., in *Pearce v. Calgary*, 54 S.C.R. 1; 9 W.W.R. 668.

In an action involving the property qualifications of a Justice of the Peace, *Squire qui tam v. Wilson* (1865), 15 C.P. 284, the principles that should govern in determining the value of land are thus referred to:—

“That the price paid for land and the money expended upon it, do not constitute its value, is a matter of every day’s experience. We incline to think its value depends much upon the number of persons who at the moment are willing to purchase, coupled with the unwillingness of the owner to sell, and in a less degree by the amount of capital held for investment in land at the time. The anxiety of the owner to sell, when few are willing to buy, frequently reduces it to a value more nominal than real. Strictly speaking, the value of land, like any other commodity, is the price it will bring in the market at the time it is offered for sale; but to apply this rule to land in this country would be manifestly unjust, for there would be found times when no one would be willing to buy at any price, and for the simple reason that capital is not, and land always is, abundant.”

### Stocks and Shares.

The values of quoted securities are based on the official *Daily Lists* of the stock exchange as at the date of death.

Where the death occurs on a Sunday or other day for which no quotations are issued, the list for the nearest business day (either before or after the death, at the option of the person accounting), is used.

If a higher and a lower closing market price is quoted, the value for purposes of duty is found by taking the lower closing price and adding to it one-fourth of the difference between it and the higher price.

Where securities are not officially quoted, the values can be ascertained by reference to any available quotations in financial publications, or by obtaining certificates from qualified brokers, or letters from the secretaries of the companies as to the values existing on the date of the deceased's death.

If values of unlisted securities cannot be otherwise ascertained, production of recent balance sheets and profit and loss accounts is generally required by the taxing authority.

The Ontario Act contains the following provisions as to the methods to be employed in ascertaining the value of securities:—

(1) For the purposes of this Act, the fair market value at the date of the death of the deceased of bonds, debentures, guaranteed investments, shares, stocks and other securities which are listed on recognized exchanges, or if not so listed, on which prices or quotations may be obtained from financial journals, recognized financial reports or licensed brokers or traders, shall be the closing price or quotation so listed or obtained on the day of the death of the deceased or if the death occur on a Sunday or holiday, then on the last preceding business day on which such prices or quotations were so listed or could have been obtained; provided that if in the opinion of the Treasurer the prices or quotations so listed or obtained were not free from the control of or manipulation by the deceased, his servant, nominee or agent or any member of his family, then such bonds, debentures, guaranteed investments, shares, stocks or other securities may be valued as provided in subsection 2.

(2) For the purposes of this Act the fair market value at the date of the death of the deceased of bonds, debentures, guaranteed investments, shares, stocks and other securities not listed or on which no prices or quotations may be obtained as mentioned in subsection 1 and the fair market value of an interest in any partnership or unincorporated business, shall be the value determined by the Treasurer from the financial position of the company, partnership or unincorporated business as disclosed by the balance sheets and the relative operating and surplus deficit accounts and such further information or material as the Treasurer may deem necessary for the purposes of this subsection; provided that where the assets of any such company, partnership or unincorporated

business consist solely of bonds, debentures, guaranteed investments, shares, stocks or other securities which are listed or on which prices may be obtained as mentioned in subsection 1, then, for the purposes of this subsection the same shall be valued as provided in subsection 1; provided further that where the assets of any such company, partnership or unincorporated business consist partly of bonds, debentures, guaranteed investments, shares, stocks, or other securities which are listed or on which prices may be obtained, as mentioned in subsection 1, then, for the purposes of this subsection the same may, at the discretion of the Treasurer, be valued partly as provided by subsection 1 and partly as provided by this subsection; provided further that no allowance shall be made for any debt for wages, salary or other remuneration due by any company, partnership or unincorporated business in which the deceased, either alone or in combination with any member of his family, was beneficially interested, directly or indirectly, to the extent of more than fifty per centum, to any member of his family except such part as the Treasurer may, in his discretion, deem reasonable or proper.

### Mortgages.

Mortgages are generally valued at their face value and accrued interest as at the date of the death of the deceased, except where the amount due thereunder exceeds the value of the real estate and the personal covenant of the mortgagor is otherwise of no value.

The Alberta statute contains the following special provision regarding the value of mortgages and agreements for sale of land:—

4. The value of any mortgage or agreement for sale of lands shall be deemed to be the full amount of the indebtedness in respect of the principal and interest thereon outstanding as at the date of death of the owner except that if within a period of three years from the date of death the person liable for payment of duty in respect thereof establishes to the satisfaction of the Minister that the personal covenant of the mortgagor or purchaser is valueless and that the estate of the deceased has suffered or is likely to suffer a bona fide loss the Minister may thereupon accept a valuation of that mortgage or agreement of sale based upon the value of the land affected thereby as of the date of death of the deceased, and may revise the claim for succession duty accordingly.

A similar provision is contained in the Saskatchewan Act, the period mentioned within which loss must be established being four years from the date of death, instead of three years, as in Alberta.

### **Book Debts and Promissory Notes.**

The value of book debts and promissory notes is presumed to be the amount of unpaid principal plus accrued interest, if any, to the date of death, unless it is established that the actual value is less. In practice, a certain discount or percentage proportion is allowed in respect of bad debts, to the extent to which it is shewn that the allowance claimed is reasonable.

### **Insurance Policies.**

The amount taxable is the amount received or receivable from the insurance company, including bonuses. In the case of policies on the life of another, the saleable value at the death of the deceased should be accounted for. This saleable value may, in certain circumstances, differ from the surrender value.

### **Furniture, Stock-in-trade, and Farming Stock.**

The form of affidavit of value and relationship which must be filed in accounting for succession duty requires particulars to be furnished of household goods, stock-in-trade, and miscellaneous assets, such as farming stock, goodwill of business or industrial concern, and other personal property. The value of these items is usually estimated by the accountable parties, the taxing authority reserving the right to call for further information if deemed necessary.

### **Partnership Assets.**

In the case of a partnership business, production of a balance sheet is usually required in order to check the accuracy of the valuation. This value is the real value of the deceased's share and not necessarily that at which the surviving partners have power to take it over. See *Brown*

v. *Attorney-General* (1898), 79 L.T. 572; 15 T.L.R. 109. The taxing authority frequently requires the partnership deed to be produced for perusal. In ascertaining the value of a partnership interest, the goodwill, if any, should be taken into account.

### **Machinery of Valuation.**

The statutes contain provisions for ascertaining the value of property passing on the death of deceased persons where the responsible Minister is not satisfied with the values given in the affidavit of value and relationship.

Sections 14 and 33 of the Quebec Act provide that whenever the Provincial Treasurer deems it necessary he may appoint one or more commissioners to hold an inquiry regarding any property forming part of a succession or a donation *inter vivos*, as to whether such property has been omitted from the declaration, or the declaration has not given the value, or the value given is not the real value. The commissioner or commissioners so appointed are required to make a report to the Provincial Treasurer of the result of the inquiry.

Provision is made by the Ontario Act for the appointment of a commissioner or commissioners to make such inquiries as may be necessary in order to determine or to assist in determining what, if any, property or the transmission or disposition of property, is or may be subject to duty; to fix and settle the value of the property, or disposition of property, for the purposes of duty, and the amount of debts, deductions, and other allowances and exemptions; to assess the cash value of every annuity, term of lease, term of years, life estate, income or other estate or interest in expectancy, and to settle the amount of duty, and determine the persons liable therefor.

Section 11 of the Ontario Act provides that in case the Provincial Treasurer is not satisfied with the sworn valuations, the Surrogate Judge shall, at the instance of the Treasurer, inquire into the correctness of the inventory.

Notice of the inquiry is given to the executor or such interested persons as the Judge by order directs. Provision is made whereby in lieu of or in addition to evidence of valuation of property, the Surrogate Judge may in the first instance, or at any time before judgment, and at the request of the Treasurer, issue a direction to the sheriff or other competent person to make an appraisement. The sheriff or other person is required to make a report in writing to the Judge of his appraisement. The inquiry of the Judge is not confined to valuations, but is extended to other matters, such as the valuation of property improperly omitted, settling the amounts of the debts and other allowances and exemptions, assessing the cash value of future estates and interests in expectancy, and determining the amount of duty and the persons liable therefor. The Provincial Treasurer, or any other person interested, may within thirty days from the date of the judgment of the Surrogate Judge, appeal to the Appellate Division, whose decision is final unless the amount involved exceeds \$10,000 in value.

The Nova Scotia statute contains provisions with regard to the appointment of a commissioner or commissioners, and with regard to inquiry by the Probate Court, similar to those contained in the Ontario Act, except that there is no special provision for appeal. It is provided, however, that the general practice and procedure of the Court shall apply in all proceedings under the statute, including the practice and procedure relating to appeals.

Where an inquiry is made by a commissioner, his report, upon being filed, becomes a judgment of the Supreme Court. Either the Treasurer or any person interested may appeal from this judgment.

With a view to arriving at finality in matters of valuation, subsection (8) of section 11 of the Ontario Act provides as follows:— The Treasurer may mail to the solicitor who files the affidavit of value and relationship or to the person acting in the administration of the property or the

person liable for the duty, a statement showing the appraisal of the property, the liability for duty under the provisions of this Act and the amount of duty, and unless within thirty days after the mailing of such statement he receives a notice in writing signed by the person acting in the administration of the property or any person affected by such statement, or the solicitor or agent for any such person stating an objection to such statement or any portion thereof and the reasons for such objection, such statement shall, for the purposes of this Act, be final and binding upon every person affected thereby; provided that where the deceased died domiciled outside of Canada, or where the sole executor resides outside of Canada, the Treasurer may extend the time hereby limited, to a period not exceeding sixty days."

Provision for the appointment of a commissioner or commissioners, with powers similar to those mentioned in the Ontario Act, has been made by the statutes of New Brunswick, Saskatchewan, Alberta, and British Columbia.

The New Brunswick Act contains provision for determining questions of valuation by agreement, as follows:

"In case any doubt or dispute arises as to the proper valuation to be placed upon any of the property of the deceased, or any beneficial interest therein, the Minister may enter into an agreement with any person liable for the payment of duty in respect thereof as to the valuation to be placed thereon, and the agreement when approved by the Governor-in-Council shall be valid and binding upon the Crown and upon every person who is a party thereto."

The Prince Edward Island Act makes provision whereby the Surrogate or Judge of Probate is empowered, at the instance of the Provincial Secretary-Treasurer, to direct in writing that an appraiser appointed by the Lieutenant-Governor in Council shall make a valuation and appraise the property. The appraiser is required to give due and sufficient notice to the executor or administrator, and to such other persons as the Judge may direct, of the time and place at which he will appraise the property. The report

of the appraiser is filed in the office of the Surrogate or Judge of Probate. Any person affected by the appraisement may appeal therefrom within thirty days to the Supreme Court, whose decision is final.

The Manitoba Act provides that at the instance of the responsible Minister, a Judge of the Court of King's Bench, or the Judge of the Surrogate Court in the district in which the property or any part thereof, is situate, upon such notice by personal or substitutional service to such of the interested parties as he by order directs, shall at the time and place mentioned in the notice or any other time and place named by him, hear and determine all questions relative to the liability of the property for duty, the amount thereof and the persons liable therefor. It is further provided that in lieu of or in addition to evidence of valuation of property, the Judge may, in the first instance or at any time before judgment, and at the request of the Minister, shall issue a direction to some person to make an appraisement of any property mentioned in the inventory, or of any property omitted therefrom; and the person so directed shall forthwith appraise the property, and make a report in writing to the Judge of his appraisement. Provision is made that after the filing of the affidavit of value and relationship, and after the making of the appraisement of value of property, if any, the Minister may mail to the personal representative of the deceased, or to a person liable or owner of property liable for duty, a notice of appraisement showing the total appraised value of the property, and, sixty days after the mailing of the notice, the appraised value shall become final and binding upon the personal representative and every person so notified, unless within that period, he notify the Minister in writing that he objects thereto, and the Minister receives the notice of objection.

In the Province of Saskatchewan, if the Attorney-General is not satisfied with the statement filed he may direct in writing some competent person to make an appraisement, and such appraiser is required to give due and sufficient notice of the time and place at which he will appraise the



property. Notice must be given to the executors or administrators and to such other persons as the Attorney-General directs. The appraiser makes a written report in duplicate, and such report is filed in the office of the clerk of the proper Surrogate Court, who thereupon forwards one duplicate thereof to the Attorney-General. The Attorney-General or any interested person may within thirty days after the making of such appraisement appeal therefrom to a Judge of the Court of King's Bench.

The provisions in the Alberta Act with respect to the determination of values are similar to those in force in the Province of New Brunswick.

Section 15 of the British Columbia Act provides that where the Minister of Finance is not satisfied that the affidavit of value and relationship discloses all the property of the deceased and transmissions of beneficial interests therein subject to duty, or is not satisfied with the value sworn to, or its correctness in other respects, the Lieutenant-Governor in Council may appoint a Commissioner under the "Public Inquiries Act" to make an inquiry into the matter. One week's written notice of such inquiry is required to be given to the executors or administrators, or to their solicitors, and to such other persons as the Commissioner considers necessary. The Commissioner must make a written report in duplicate, one of which is to be sent to the Lieutenant-Governor in Council, and the other to the executors or administrators, or their solicitors. Any person dissatisfied with the report of the Commissioner may appeal therefrom to the Court of Appeal within thirty days after the making and receipt of the report by the Lieutenant-Governor in Council.

The provisions in the Succession Duty Ordinance of the Yukon Territory with respect to the procedure to determine valuations are similar to those in force in Manitoba.

## CHAPTER XII.

### Exemptions and Remissions.

The subject of exemptions and remissions may be considered under the following headings, namely:—

1. Estates of small value.
2. Charitable, religious or educational bequests and donations.
3. Bequests and donations for public purposes.
4. Gifts *inter vivos*.
5. Benefits not exceeding a certain value.
6. Insurance.
7. Property passing by purchase.
8. Annuities provided by the deceased.
9. "Quick Succession" allowance.
10. Government Bonds and securities.
11. Remission of duty on property of deceased soldiers.
12. Remission of duty where imposition causes hardship or injustice.

### Estates of Small Value.

The statutes make provision for exemption of the following classes of estates of small value, namely:—

- (a) Estates not exceeding a certain value irrespective of the relationship of the beneficiaries to the deceased;
- (b) Estates of a value not exceeding a specified figure passing to Class 1 or preferred beneficiaries; and
- (c) Estates of a value not exceeding a specified figure passing to Class 2 or collateral beneficiaries.

No duty is imposed in Saskatchewan, Alberta, British Columbia, and the Yukon Territory, in estates not exceeding

**\$1,000 in value. This amount is increased to \$1,500 in Manitoba, and to \$5,000 in Ontario, Nova Scotia and New Brunswick.**

**Estates passing to Class 1 or preferred beneficiaries are exempt from duty in all the provinces to the following extent, namely:—**

**The Prince Edward Island statute provides that no duty shall be payable:**

- (a) On any property passing on the death of any person to or for the benefit of the husband, father, mother, brother, sister, grandchild, daughter-in-law, son-in-law, child or children not dependent upon the deceased at the time of his death, wife without dependent children by the deceased living at the time of his death, if the aggregate value of the property passing on such death does not exceed \$5,000; and**
- (b) On any property passing on the death of any person to or for the benefit of a wife with a dependent child or children by the deceased living at the time of his death, or the dependent child or children, or the wife and dependent child or children of the deceased, if the aggregate value of the property passing on such death does not exceed \$10,000.**

**No duty is payable in Ontario, Nova Scotia, and New Brunswick in estates passing to Class 1 or preferred beneficiaries where the aggregate value of the property passing does not exceed \$25,000. The same exemption exists in Manitoba, but is confined to cases where the deceased was at the time of his death domiciled in the province, and the beneficiaries were resident in the province at that time.**

**In Quebec the exemption in favour of preferred beneficiaries is governed by the following provisions, namely:—**

**(1) Where the succession devolves, in whole or in part, to the surviving consort, or to the child, or to all or any of the children of the deceased, the amount of the exemption to**

be allowed shall be as follows, to wit: \$10,000 if there be a surviving consort, and, in addition, if there be any surviving child or children, \$1,000 for each child, provided that if there be no surviving consort, the amount of the exemption to each child shall be left at \$1,000 but, in either case, the total amount of the exemption shall not exceed \$15,000.

(2) For the purposes of the foregoing paragraph 1 of this section, the word "child" shall include any other successor in the direct line, ascending or descending, the father- or mother-in-law, the son- or daughter-in-law, and the step-son or stepdaughter of the deceased, provided that they be dependent upon the deceased and were living with the latter at the time of his death.

These exemptions only apply to beneficiaries domiciled in the Province of Quebec at the time of the death.

In Saskatchewan and Alberta no duty is payable in estates passing to resident preferred beneficiaries where the property passing does not exceed \$15,000 in aggregate value. In Saskatchewan this exemption is not applicable where the deceased was not domiciled in the province at the time of his death.

No duty is payable in British Columbia in estates not exceeding \$20,000 in aggregate value. Where an estate exceeds \$20,000 duty is charged on the excess amount.

In the Yukon Territory Ordinance it is provided that no duty shall be payable on or in respect of:

- (a) property passing to or for the use of a person resident in the Territory and being the father, mother, husband, wife or child of the deceased, where the net value of the property of the deceased does not exceed \$10,000 and the deceased at the time of his death was resident in the Territory;
- (b) \$5,000 in the aggregate, in case the deceased leaves surviving him a widow or a child under 18 years of age, or both; and
- (c) \$10,000 in the aggregate, in case the deceased leaves surviving him either a widow or more than one child under 18 years of age or two or more children under that age.

Estates passing to Class 2 or collateral beneficiaries are exempt if they do not exceed in aggregate value the following amounts, namely:—

Alberta, British Columbia, and Yukon Territory.	\$ 1,000.00
Manitoba . . . . .	1,500.00
Saskatchewan . . . . .	2,500.00
Nova Scotia, and Prince Edward Island . . . . .	5,000.00
Ontario, and New Brunswick . . . . .	10,000.00

### Charitable, Religious or Educational Bequests and Donations.

The statutes make provision for exemption of charitable, religious, and educational gifts, in the following terms, namely:—

#### Prince Edward Island.

“Succession duty shall not be levied or payable on any property,—

“(a) devised or bequeathed for religious or charitable purposes to be carried out

(1) in Prince Edward Island; or

(2) by a person resident in Prince Edward Island; or

(3) by a corporation with head office in any of the three Maritime Provinces where such corporation administers to charitable, religious or educational purposes for the (joint) benefit either in whole or in part of any person or class of persons in Prince Edward Island.

“(b) devised or bequeathed on account of, or payable in respect of, any unpaid subscription for any religious, charitable or educational purpose made by any person in his life-time to any person or corporation mentioned in this subsection for which his estate is liable.”

**Nova Scotia.**

"Succession duty shall not be leviable or payable:

- (a) On any property passing on the death of any person and devised or bequeathed for religious, charitable or educational purposes to be carried out in Nova Scotia, if the aggregate value of the property passing on such death does not exceed \$25,000, or
- (b) On any money payable on account of any unpaid subscription for any such purpose made by any person in his lifetime for which his estate is liable."

**Ontario.**

"Notwithstanding anything in this Act contained,—

- “(a) a disposition of any property by the deceased, in his life-time, and any property devised or bequeathed by him to or in favour of a religious, charitable or educational organization for religious, charitable or educational purposes, when such organization carries on its work solely within Ontario;
- “(b) a disposition of any property by the deceased, in his life-time, for necessities or education for any member of the family of the deceased, when it is shewn to the satisfaction of the Treasurer that such member was dependent in whole or in part on the deceased for such necessities or education; shall not be included for the purpose of arriving at the aggregate value or be liable for duty.”

“When a religious, charitable or educational organization carries on its work both within and outside Ontario and there is a disposition of any property by the deceased in his lifetime or any property is devised or bequeathed by him to such organization, notwithstanding anything in this Act contained, the portion of such property as is in the same ratio to the whole that the ratio of the expenditures of the

organization for carrying on its work in Ontario bears to its total expenditures, during such period as the Treasurer may determine, shall not be included for the purpose of arriving at the aggregate value and duty shall not be payable with respect to such portion."

"When there is a disposition of any property by the deceased in his lifetime or any property is devised or bequeathed by him to the Canadian Red Cross Society, notwithstanding anything in this Act contained, such property shall not be included for the purpose of arriving at the aggregate value and duty shall not be payable with respect to such property." .

The expression "Member of the family of the deceased", as used in the Ontario Act, means any person coming within the class of "child" as defined by the Act, any person adopted by the deceased under The Adoption Act, the spouse and lawful descendant of any such adopted person, the husband or wife of the deceased, the father, mother and any brother or sister of the husband or wife of the deceased, any lawful descendant of such brother, or sister, the father, mother and any brother or sister of the deceased, any lawful descendant of such brother or sister, any brother or sister of the father or mother of the deceased, any lawful descendant of such brother or sister, any grandfather or grandmother of the deceased and any son-in-law or daughter-in-law of the deceased.

#### **New Brunswick.**

"No duty shall be payable on or in respect of property given, devised or bequeathed for religious, charitable or educational purposes to be carried out in New Brunswick, or the amount of any unpaid subscription for any like purpose for which his estate is liable.

#### **Quebec.**

"No duty shall be leviable on property devised or bequeathed for religious, charitable or educational purposes to be carried out in the Province of Quebec by a corporation

or a society having an establishment within the Province of Quebec or by a person resident in the Province of Quebec, nor on the amount of any unpaid subscription for any like purpose made by any person in his lifetime to any corporation, society or person mentioned in this section for which his estate is liable."

#### **Manitoba.**

"No duty shall be payable on or in respect of property devised or bequeathed for religious, charitable or educational purposes to be carried out in the province, and not exceeding in value the sum of \$2,000 for any one purpose."

Where the property exceeds \$2,000 in value for any one purpose, duty is charged on the scale applicable to Class 2 or collateral beneficiaries instead of on the scale applicable to strangers.

#### **Saskatchewan.**

There is no exemption in Saskatchewan in respect of property devised or bequeathed for religious or charitable purposes. Gifts to the province or to the university are, however, wholly excluded from the operation of the Act.

#### **Alberta.**

"No duty shall be payable on or in respect of:

- "(a) property transferred by grant or gift or devised or bequeathed for religious, charitable or educational purposes to be carried out within the province, except to the extent to which the value of property exceeds the sum of \$2,000 for any one purpose;
- "(b) property transferred by grant or gift, or devised or bequeathed to the University of Alberta for educational purposes;
- "(c) property passing to the University of Alberta under the provisions of The Ultimate Heir Act."



**British Columbia.**

"This Act shall not apply, so far as liability to pay succession duty is concerned, to any property transferred by grant or gift, whether made in contemplation of death or otherwise, or devised or bequeathed by any person dying after the first day of January, 1922, for religious, charitable or educational purposes to be carried out in the province, or on the amount of any unpaid subscription for any like purpose made by any person so dying for which the estate of the deceased is liable."

**Yukon Territory.**


"No duty shall be payable on or in respect of property devised or bequeathed for religious, charitable or educational purposes to be carried out in the Territory, and not exceeding in value the sum of \$2,000 for any one purpose."

It has been held in New Brunswick that a bequest for charitable purposes is not exempt from succession duty if it is not restricted to purposes to be carried out in the province.

*Provincial Secretary-Treasurer of New Brunswick v. Robinson & Bartlett* (1919), 47 N.B.R. 55; 49 D.L.R. 361.

In this case, the New Brunswick Supreme Court held that a bequest to trustees to be used and employed "for the benefit, advantage, assistance, or the founding of such charitable, educational or sanitary institutions" as they may "from time to time see fit and desirable" was not exempt from succession duty under the Succession Duty Act, 1915, 5 Geo. V., ch. 27, section 6(2), inasmuch as the bequest was not restricted to "purposes to be carried out New Brunswick."

**Bequests and Donations for Public Purposes.**

By section 4 of the Ontario Act it is provided that no duty shall be leviable on property devised or bequeathed to  for the benefit of the Dominion of Canada, the Province of Ontario or any municipality within the Province.

Section 4c provides that when there is a disposition of any property by the deceased in his lifetime or any property is devised or bequeathed by him to the Canadian Red Cross Society, notwithstanding anything in the Act contained, such property shall not be included for the purpose of arriving at the aggregate value and duty shall not be payable with respect to such property.

The Saskatchewan Act provides that where property has been given by the deceased in his lifetime, or is devised or bequeathed by his will, to or for the benefit of the Province of Saskatchewan, or to or for the benefit of the University of Saskatchewan, and such property is accepted by the donee in the terms of the gift thereof, then such property shall not be deemed to be property passing on the death of the deceased for any purpose whatsoever under the Act.

The exemptions provided for by the Alberta Act include,—

- (a) property transferred by grant or gift, or devised or bequeathed to the University of Alberta for educational purposes; and
- (b) property passing to the University of Alberta under the provisions of the Ultimate Heir Act.

#### Gifts Inter Vivos.

The following gifts *inter vivos* are exempt from duty, namely:—

##### *Ontario:—*

- (a) Dispositions made more than three years before the death of the donor to the father, mother, child, son-in-law or daughter-in-law of the donor, to the value or amount of \$20,000 in the aggregate among all of them.
- (b) Dispositions which in the case of any one donee do not exceed in the aggregate \$500 in value or amount.

- (c) Dispositions *bona fide* made for full consideration in money or money's worth paid to the transferor for his own use and benefit; provided that this shall not apply to anything contained in clause c of section 6b concerning transfers in consideration of marriage.

The Ontario Act also provides that notwithstanding anything in the Act contained the following class of dispositions shall not be included for the purpose of arriving at the aggregate value or be liable for duty, namely:—

“Dispositions of any property made by the deceased, in his lifetime, to or for the benefit of any member of his family, where actual and *bona fide* possession and enjoyment of the property in respect of which the disposition was made, shall have been immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him whether voluntary or by contract or otherwise, more than ten years preceding the date of the death of the donor.”

*Quebec:—*

- (a) Gifts made more than five years before the death of the donor where the donor has not reserved to himself, in whole or in part, the control, administration, ownership, or enjoyment of the property or part thereof, until his death, or until a period after his death.
- (b) Immediate gifts which in the case of any one donee do not exceed in the aggregate \$1,000 in value or amount.
- (c) Gifts of agricultural property made by a farmer to another farmer where the value of the property given does not exceed \$10,000. If the value exceeds \$10,000, the excess is subject to duty.

*Nova Scotia:—*

- (a) Immediate gifts made more than three years before the death of the donor to the father, mother, husband, wife, child, son-in-law or daughter-in-law of the donor, to the value or amount of \$20,000 in the aggregate among all of them.
- (b) Immediate gifts which in the case of any one donee do not exceed \$500 in the aggregate.

*Saskatchewan:—*

- (a) Immediate gifts made more than three years before the death of the donor to the father, mother, child, son-in-law or daughter-in-law of the donor to the value of \$15,000 in the aggregate.
- (b) Immediate gifts which in the case of any one donee do not exceed in the aggregate \$500 in value or amount.
- (c) Immediate gifts which are proved to have been part of the ordinary or normal expenditure of the deceased, and to have been reasonable, having regard to the amount of his income, or to the circumstances.

**Normal and Reasonable Expenditure.**

“Normal expenditure” of the deceased, for which exemption is provided in the Saskatchewan Act, means expenditure which the deceased has more or less been in the habit of making. For example, if a man makes yearly gifts of jewellery to each of his children, this may be described as habitual expenditure on his part. Besides being normal or habitual, the gift must also be reasonable, having regard to the circumstances. Gifts out of the capital of the deceased are not considered to be normal and reasonable. Examples of gifts which come within the exemption are moderate

allowances to children or near relatives, pensions to servants, and charitable donations, paid out of the donor's income, and which he is in the habit of providing for regularly.

If a gift is considered as coming within the category of normal expenditure of the deceased it is excluded in the computation of both the aggregate and dutiable value of the property passing on the death.

#### **Benefits Not Exceeding a Certain Value.**

The Province of New Brunswick exempts property passing to any one person not exceeding \$200 in value. This amount is increased to \$300 by the statutes of Nova Scotia, Manitoba and Saskatchewan, and to \$500 by the Ontario statute.

The statutes of Ontario and Quebec provide for exemption of a bequest to an employee of a deceased person, provided the beneficiary has been in the employment of the deceased for at least five years immediately prior to his death, and provided the benefit does not exceed \$1,000. The exemption in Quebec only applies to beneficiaries domiciled in the province.

The Quebec Act provides that where the succession devolves, in whole or in part, to a brother or sister of the deceased, who is depended upon the latter for a living, the amount of the exemption to be allowed to him or to her shall be \$1,000, provided he or she is domiciled in the province.

#### **Insurance.**

Provision has been made by certain of the statutes for exempting insurance moneys from taxation to a limited extent.

By section 6(f) of the New Brunswick Act it is provided that no duty shall be payable on or in respect of "the amount of any life insurance policy or policies effected by a deceased person on his life and expressly made payable to the Provincial Treasurer or an executor or trustee for the purpose of

paying duty imposed by the Act, except as to any excess in such amount over and above the amount of the duty, which excess, received by the Provincial Treasurer, shall be accounted for by him, to the person entitled thereto."

A similar provision is contained in the statutes of Nova Scotia, Prince Edward Island, Manitoba, Saskatchewan, Alberta, and the Yukon Territory.

Insurance moneys payable to preferred beneficiaries are exempted from taxation to a limited extent by some of the provinces.

Subsection (3) of section 5 of the British Columbia Act provides that the Act shall not apply, so far as liability to pay succession duty is concerned, where the aggregate of the amounts of property of the deceased, wherever situate, both within and without the province, passing to or for the use of the father, mother, husband, wife, child, grandchild, son-in-law and daughter-in-law of the deceased, consisting only of insurance moneys which are proceeds of insurance effected on the life of the deceased, does not exceed \$25,000. If the amount exceeds \$25,000, duty is payable on the excess.

The Nova Scotia Act provides for the exemption of any moneys received or payable under a contract of insurance effected by any person on his life if such moneys are payable to a preferred beneficiary, and if the aggregate amount of such insurance or insurances does not exceed \$5,000.

The Saskatchewan Act contains a similar provision.

The statutes of Manitoba and the Yukon Territory provide that no duty shall be payable on or in respect of money received or receivable under a policy of insurance on the death of a deceased resident in the province, payable to or for the use of his widow or children, or both, when resident in the province, not exceeding

- (a) \$5,000 in the aggregate, in case the deceased leaves surviving him a widow or a child under eighteen years of age, or both; and

- (b) \$10,000 in the aggregate, in case the deceased leaves surviving him either a widow and more than one child under eighteen years of age or two or more children under that age.

### **Property Passing by Purchase.**

The statutes of Nova Scotia and Prince Edward Island provide that succession duty shall not be leviable or payable "in respect of any property passing on the death of any person by reason only of a *bona fide* purchase from the person under whose disposition the property passes where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use and benefit; provided, however, that where any such purchase was made for partial consideration in money or money's worth paid to the vendor for his own use or benefit the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of succession duty.

Section 6b of the Ontario Act provides that a disposition of any property by any person, during his lifetime, shall be deemed to include for all purposes of the Act the transfer of, or the agreement to transfer any property by the deceased, for partial consideration in money or money's worth for the deceased's own use and benefit to the extent to which the value of the property so transferred or agreed to be transferred exceeds the value of such consideration.

Similar provisions are contained in the statutes of New Brunswick and Saskatchewan.

The Alberta and British Columbia Acts provide that nothing therein contained shall render liable for duty any property *bona fide* transferred for a consideration that is of a value substantially equivalent to the value of the property transferred.

### **Annuities Provided by the Deceased.**

Section 4a of the Ontario Act provides that notwithstanding anything in the Act contained the following classes of annuities, pensions, and other periodic payments, shall

not be included for the purpose of arriving at the aggregate value or be liable for duty:—

- (a) any payment made to or enjoyed by any member of the family of a deceased person, on or after the death of the deceased, out of or in respect of any pension fund or scheme of general application to employees, by reason of the employment of the deceased by the Dominion of Canada, or any province of Canada or any other country or any state, or municipality; and
- (b) any annuity, income, periodic payment or other interest effected, contracted for, or applied for by a deceased person during his lifetime whether in connection with his employment or otherwise and paid to or enjoyed by the wife, or any dependent father, mother, brother, sister or child of the deceased on or after the death of such deceased, to the extent of 1,200 per annum in respect of any one person and to the extent of \$2,400 per annum, in the aggregate.

Section 4 of the Ontario Act provides that no duty shall be leviable where the property passing to any one person or the disposition of any property with respect to such person consists wholly of an annuity of not more than \$100 per annum, or of an estate or interest in life or for a term in any property the yearly income from which does not exceed \$100.

Provision has been made in Saskatchewan for exemption from duty "in respect of any pension or annuity payable to the widow or child of any deceased clergyman, notwithstanding that the deceased contributed during his lifetime to any fund out of which such pension or annuity is so payable."

#### **"Quick Succession" Allowance.**

The New Brunswick Act makes provision for reduction of duty in circumstances where a short time elapses be-



tween two successions affecting the same property. This provision is as follows:—

“Whenever there may be assessable for succession duty any amount on account of property in respect of which succession duty was assessed to the province on a former occasion and it appears that, owing to the shortness of the period between the two successions, or by reason of any other circumstances, it may be inequitable or a hardship or an inconvenience that the full amount of succession duty assessed be paid, or be paid at one time, the Governor-in-Council may:

- (a) Reduce the amount of succession duty payable:
- (b) Postpone the payment of the whole or any part of said duty to such time or times as may seem just and reasonable; or
- (c) Agree with the several persons interested in said property, or any of them, for the charging of a portion or portions of the said duty upon their several interests therein.”

The Saskatchewan Act provides that where the Attorney-General is satisfied that succession duty has become payable on any property or with respect to the succession to any property and that subsequently within three years succession duty has again become payable on the same property or any part thereof or with respect to the succession to the same property or any part thereof passing on the death of the person to whom the property passed on the first death, the amount of succession duty payable on the second death in respect of the property so passing or in respect of the succession to such property shall be reduced as follows:

- (a) where the second death occurs within one year of the first death, by 50 per cent.;
- (b) where the second death occurs within two years of the first death, by 30 per cent.;
- (c) where the second death occurs within three years of the first death, by 10 per cent.

### Government Bonds and Securities.

Government securities and the moneys invested therein have from time to time been exempted from duty by certain of the provinces.

By section 11 of the Revised Statutes of Alberta, 1922, it is provided as follows:—

**11.** All moneys invested in Alberta Government stock or debentures, and the interest thereon, shall be exempt from municipal taxation in the province, and shall be free from all provincial taxes, succession duty, charges and impositions.

Section 9 of The Saskatchewan Loans Act, being Chapter 34 of the Revised Statutes 1930, provides that "Province of Saskatchewan securities and moneys invested therein and the interest thereon, and the succession to such securities on the death of the owner, shall be free from provincial taxes, succession duties, charges and impositions, and shall also be exempt from municipal and school taxes."

This provision was repealed by section 3 of Chapter 10 of the Statutes of 1934-35, as amended by Chapter 9 of the Statutes of 1936, and the following substituted therefor:—

**9.—(1)** Subject to the provisions of subsection (2) Province of Saskatchewan securities and moneys invested therein and the interest thereon, and the succession to such securities on the death of the owner, shall be subject to provincial taxes, succession duties, charges and impositions, and shall also be subject to municipal and school taxes.

**(2)** Subsection (1) shall not apply to: (a) securities heretofore issued or moneys heretofore invested therein or the interest thereon, or the succession to such securities on the death of the owner; (b) securities hereafter issued pursuant to the Saskatchewan Farm Loans Act, unless otherwise ordered by the Lieutenant-Governor in Council prior to the issue of the securities.

The amendment came into force on December 4, 1934, and the effect thereof is that while securities issued before that date are exempt from taxation, those issued subsequently are not so exempt, except in the case of securities

issued pursuant to The Saskatchewan Farm Loans Act where the Lieutenant-Governor in Council has ordered that the exemption shall be applicable.

In the Province of Nova Scotia two of the provincial issues of stock were exempted from succession duty, but otherwise no exemption exists.

By section 10 of Chapter 156 of the Revised Statutes of Manitoba, 1913, it is provided that "All bonds, debentures and inscribed stock, and the interest thereon, issued under the authority of this Act, shall be free from all provincial taxes, succession duty, charges and impositions, and all moneys invested in Manitoba Government stock, bonds or debentures, and the interest thereon, shall be exempt from municipal and school taxation in this province."

During the limited period in which this provision was in force, certain provincial securities were issued in Manitoba, and these securities are exempt from duty. The provision was repealed by section 1 of Chapter 46 of the Statutes of 1924.

The bonds and securities of the Province of Quebec issued under the authority of the following statutes are exempt from succession duty, namely,—3 Geo. V., ch. 6; 3 Geo. V., ch. 21; 5 Geo. V., ch. 4; 10 Geo. V., ch. 6; 13 Geo. V., ch. 2; 54, 56, 57 Vict., ch. 2.

The Province of Ontario has exempted from succession duty provincial bonds and securities issued under the following statutes, namely:—5 Ed. VII, ch. 2; 6 Ed. VII., ch. 4; 9 Ed. VII., ch. 8; 1 Geo. V., ch. 9; 1 Geo. V., ch. 4; 2 Geo. V., ch. 2; and 4 Geo. V., ch. 9.

By section 10 of the Ontario Loans Act, being Chapter 23 of the Revised Statutes of 1927, it is provided that "The Lieutenant-Governor in Council may direct that money invested in Ontario Government stock, bonds or debentures, and the interest thereon, shall be free from all provincial taxes, succession duty, charges and impositions, and from municipal taxation."

Where an estate includes tax free securities, the Provincial Treasurer of Ontario may require such securities to be applied on account of the duty payable.

The Supreme Court of Canada has held that the taxation imposed by the Nova Scotia legislation of 1895 constitutes a tax upon the succession to property and not a tax upon the actual property, and that the succession to Government bonds and securities is liable to such taxation notwithstanding the exemption of such securities from taxation for provincial, local or municipal purposes.

See *Lovitt v. Attorney-General for Nova Scotia*, 33 Can. S.C.R. 350; (1903), 23 C.L.T. 212.

A part of the estate of George H. Lovitt, late of Yarmouth, Nova Scotia, deceased, consisted of debentures of the Province of Nova Scotia, issued under the provisions of a statute of the province, which exempted them from taxation for provincial, local or municipal purposes. It was held by the Nova Scotia Supreme Court (per Weatherbe, J., Graham, J., and Meagher, J.,—McDonald, C.J., and Ritchie, J., dissenting)—that notwithstanding the exemption from taxation, under the provisions of the Act, the debentures in question must be included in the valuation of the estate for the purposes of determining the amount payable to the Government of the province under the Nova Scotia Succession Duty Act of 1895.

On appeal to the Supreme Court of Canada, the judgment was confirmed, Sedgewick and Mills, JJ., dissenting, and it was held that although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale, when passing to legatees, were so liable. The majority finding of the Court was based upon the view that the Nova Scotia Succession Duty Act, 1895, properly construed, did not impose a tax upon property, but rather a tax upon the privilege of taking or transmitting property by will or intestacy. Mills, J., in his dissenting judgment, said: "Succession to an

inheritance, it is true, may be taxed as a privilege, and notwithstanding the property is already taxed, but it ought to be clear and explicit that the Legislature intended the burden. It is expressly provided by the statute of Nova Scotia, that, 'the debentures issued under the authority of this Act shall not be liable to taxation for provincial, local or municipal purposes in Nova Scotia.' This is as far as the Legislature could go; it could not protect him if domiciled elsewhere, so that the maxim *mobilia sequuntur personam* would apply. But it is said that this tax is not a tax upon the bonds, but a tax upon their transmission. The statute declares otherwise. The distinction may have served the purpose of enabling the Court in the United States to surmount a constitutional difficulty, but it has no applicability here. This succession duty is a tax imposed for provincial purposes to provide a fund for defraying in part the care of the insane, by a succession duty on certain estates. It is not a charge for the privilege of transmission, but a charge upon the estate, and declared to be so in express words."

It is thought that the majority judgment of the Supreme Court of Canada in this case was erroneous, and that Mills, J., was correct in his view that the Nova Scotia Act of 1895 was not a charge upon the privilege of transmission, but a charge upon the estate. This conclusion is supported by the wording of section 5 of the Act, providing that "All property situate or being within the province of Nova Scotia . . . passing either by will or intestacy . . . shall be subject to a succession duty to be paid for the use of the province."

In the later case, *Re v. Lovitt*, 43 S.C.R. 106, Anglin, J., expresses the view that the decision of the majority of the Court in *Lovitt v. Attorney-General for Nova Scotia* may not now be regarded as a binding authority in view of the opinions since expressed in the *House of Lords in Winans v. Attorney-General* (1910), A.C. 27.

It has been held by the Ontario Supreme Court, Appellate Division, that in the distribution of the estate, an executor may and it is his duty to allocate tax-free securities in

such a manner as to reduce the succession duty to the lowest possible minimum. *Re Aikins* (1928), 2 D.L.R. 415; 62 O.L.R. 33.

In order to counteract the effect of this decision, the statutes of Ontario, Manitoba and Alberta, have made provision for exempt bonds being distributed on a proportionate basis for succession duty purposes.

#### Property of Deceased Soldiers.

Subsection (2) of section 10 of the Nova Scotia Act provides that "where any person dies from wounds, inflicted, accident occurring, or disease contracted within twelve months before his death, while in the active military or naval service of His Majesty, whether in Canada or abroad, the Treasurer may if he thinks fit remit the whole or any part of the duty payable in respect of property passing upon the death of the deceased to the wife, husband, child, son-in-law or daughter-in-law of the deceased."

A similar provision is contained in section 5 of the Ontario Act and in section 82 of the Saskatchewan Act except that the power of remission is extended to include the duty chargeable in respect of property passing upon the death of the deceased to the father, mother, brother or sister of the deceased.

#### Remission of Succession Duty.

The provinces have, in some cases, made provision for the remission of taxation, including succession duty, in circumstances where the imposition of the tax is found to cause hardship or injustice.

By section 49 of the Manitoba Treasury Act, being Chapter 45 of the Statutes of 1936, it is provided as follows:—

- (1) Upon the report of the Minister in charge of a department to the Treasurer that it would be right and conducive to the public good or that great hardship or injustice to individuals would otherwise ensue, the Lieutenant-Governor in Council, upon the recommendation of the Treasurer, may remit any tax, fee, or the

whole or any part of a fine, penalty, or forfeiture payable to His Majesty, notwithstanding that the whole or any part of any such fine, penalty or forfeiture is given by law to the informer or prosecutor or to any other person.

A similar provision is contained in section 59 of the Saskatchewan Treasury Department Act, Chapter 21 of the Revised Statutes of 1930; section 56 of the Alberta Treasury Department Act, Chapter 12 of the Revised Statutes of 1922; and section 43 of the British Columbia Revenue Act, Chapter 222 of the Revised Statutes 1924.

Section 32 of the New Brunswick Act provides that the Governor-in-Council may, if he deems it in the public interest, reduce the amount of succession duty payable:

- (a) In respect to property given, devised or bequeathed for religious, charitable or educational purposes, when any of such purposes are deemed by him of direct benefit to persons residing in the province;
- (b) When such a relatively large proportion of the property in respect of which the duty is computed is situate outside the province that, in the opinion of the Governor-in-Council, an undue burden is placed upon any person to whom the property in the province passes; and
- (c) In respect to property passing to a beneficiary who resides outside the province.

Section 44 of Chapter 22 of the Revised Statutes of Quebec, 1925, empowers the Crown to remit duties, taxes and penalties, but the provisions of that statute are seldom invoked.

## CHAPTER XIII.

### ACCOUNTABLE PERSONS AND CROWN LIEN OR CHARGE ON PROPERTY.

The persons accountable for succession duty may be classified under the following headings, namely:—

- (a) Executors and administrators.
- (b) Beneficiaries.
- (c) Trustees, guardians, and other persons.
- (d) Alienees and derivative owners.
- (e) Companies.

#### Executors and Administrators.

The statutes require the executor or administrator to file an affidavit of value and relationship, with inventories, within a limited time after the death of the deceased, and before the issue of letters probate or letters of administration. The affidavit must contain a full itemized inventory in detail of all the property passing or deemed to pass on the death of the deceased, including any property situate outside the province, and the fair market value thereof on the date of his death. It must also disclose the several beneficiaries to whom the property passes, their places of residence, and the degrees of relationship, if any, in which they stand to the deceased.

The time within which the affidavit must be filed in the several provinces is as follows:—

*Alberta:*—Every beneficiary, and every trustee, guardian, committee, or other person in whom any interest in or the management of property is vested, must file the affidavit within three months after the death of the deceased or within such further time as the Minister may allow. Before the granting of letters probate or letters of administration a similar affidavit is required to be filed by the applicant.



**British Columbia:**—The applicant for probate or letters of administration must file the affidavit within six months after the death of the deceased. If it is not filed within that time, the Act provides that every beneficiary, and every trustee, guardian, committee, or other person in whom any interest in or the management of the property is vested, shall file the affidavit within seven months after the death of the deceased or within such further time as the Minister may allow.

**Manitoba:**—The statutory provisions are the same as those in force in the Province of Alberta.

**New Brunswick:**—Section 17 provides that every beneficiary, and every trustee, guardian, committee or other person in whom any interest in or the management of the property is vested, shall file the affidavit within three months after the death of the deceased, or within such further time as the Minister may allow. It is further provided that before the granting of letters probate or letters of administration, or within such time thereafter, not exceeding three months, as may be allowed by the Judge of Probate, the applicant must file the prescribed affidavit.

**Nova Scotia:**—The affidavit is required to be filed by every beneficiary, and every executor, within three months after the death of the deceased, or such later time as may be allowed by the Treasurer. If it is not filed within that time, the Treasurer may apply to the Court of Probate for an order compelling the executor or administrator to file the same within such period as the Court directs.

**Ontario:**—Section 10 provides that every beneficiary shall within three months after the death of the deceased, or such later time as may be allowed by the Treasurer, make and file the prescribed affidavit with the Treasurer or the Registrar of the Surrogate Court. It is further provided that before the issue of letters probate or letters of administration the affidavit shall be filed by the executor or administrator.

*Prince Edward Island*.—Every beneficiary is required to file the affidavit within three months after the death of the deceased or such later time as may be allowed by the Treasurer. Before the issue of letters probate or letters of administration the affidavit must be filed by the executor or administrator. If letters are not applied for and granted within thirty days after the death, the Attorney-General may apply for same, and thereupon the estate is administered under the direction of the Court of Chancery.

*Saskatchewan*.—Section 24 provides that every beneficiary shall file the affidavit within six months after the death of the deceased, or within such further time as the Attorney-General may allow. It is further provided that before the issue of letters probate or letters of administration and within twelve months after the death of the deceased or such further time as the Attorney-General may allow, a similar affidavit shall be filed by the applicant.

*Yukon Territory*.—The statutory provisions are the same as those in force in Alberta, except that a period of six months is allowed in which to file the affidavit.

*Quebec*.—The affidavit is required to be filed by every beneficiary, and every executor, trustee, or administrator, within three months after the death of the deceased, or such further time, not exceeding six months, as may be granted by the Provincial Treasurer.

As a rule, the statutes provide that if any one beneficiary or the executor or administrator, files the affidavit, the others may be relieved from the necessity of so doing.

The statutes of New Brunswick, Manitoba, Alberta, and the Yukon Territory provide that in the event of default on the part of an executor or administrator in filing the affidavit within the prescribed time, such executor or administrator shall incur a penalty of \$10 for each day during which the default continues.

The Quebec Act provides that if any declaration is not filed within the prescribed time, or within such extended time as may be granted, the executor or administrator shall

be liable to a fine of not more than \$1,000, and, in default of payment thereof, to imprisonment for not more than one month. It is also provided that the fine may be levied on the personal property of the executor or administrator.

By the statutes of New Brunswick, Ontario, Saskatchewan, and Alberta, it is provided that the executor or administrator shall be deemed to be a revenue officer for the collection of the duty. His functions under these statutes are accordingly not confined to the deduction of the succession duty from the properties which actually come into his possession, but he is also clothed with authority to act as collection agent for the Crown in respect of the duty on other properties passing or deemed to pass on the death, such as, for example, on property owned jointly, and on gifts *inter vivos*.

As the provinces are confined to direct taxation, the statutes in all cases provide that the executor or administrator shall not be personally liable for payment of the duty. It is provided, however, that such executor or administrator shall not transfer estate property to the person entitled thereto without deducting therefrom the duty for which such person is liable. If he transfers the property without deducting the duty he becomes liable to a penalty, which may be recovered, with costs, in any Court of competent jurisdiction. This penalty is equivalent to double the duty in the provinces of Prince Edward Island, Nova Scotia, New Brunswick, Manitoba, Saskatchewan, Alberta, and in the Yukon Territory. The Nova Scotia Act provides that the penalty shall not be collectible in the case of the transfer or delivery of one-half of money deposits, or \$500, whichever amount may be less, provided that immediately on such transfer or delivery the person or corporation concerned notifies the Provincial Treasurer in regard thereto. In Ontario the penalty recoverable against the executor or administrator for transferring property without having deducted the duty, is the amount of the duty and interest thereon together with an additional fifty per centum of the

amount of such duty. The British Columbia statute provides for a penalty of not less than the duty and not more than double the duty, and further provides that in default of payment the executor or administrator shall be liable to imprisonment for not less than one month, nor more than six months.

In Quebec there is a statutory prohibition upon an executor or administrator transferring or paying legacies until the duties applicable thereto have been paid. Any person violating this provision is liable to a fine equal to twice the amount of the duty, when any duty is exigible, or to a fine of not more than \$1,000 when no duty is exigible, and, on failure to pay such fine in either case, with the costs, the offender is liable to imprisonment for not more than one month. The amount of the fine and costs may be levied on the personal property of the person in default.

The Quebec Act provides that the executor or administrator may be required to pay the duties out of the property or moneys in his possession belonging or owing to the beneficiaries, and that, if he should fail to do so, he may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity is to be executed against such property or money only. A similar provision is contained in the statutes of Saskatchewan and British Columbia.

If the outside personal property of the deceased is actually brought or sent into the taxing province it may be subject to seizure under writ of execution upon a judgment obtained against the domiciliary executor or administrator for the duty payable. Subsection (1) of section 51 of the Saskatchewan Act provides for such action being taken in the following terms, namely:—

**§1.—(1)** No executor or trustee shall be personally liable to pay the duty imposed by this Act upon the property passing on the death of a deceased person, or the duty imposed in respect of the succession to property. Nevertheless the executor or trustee may be required to pay such duty out of the property or money in his possession belonging or owing to the beneficiaries, or out of any

such property or money which he can reduce into his possession, or which has come into his possession or is vested in him or is under his control in his capacity as executor or trustee, or by virtue of his authority in that capacity, and, if he fails to do so within a period of twelve months from the death of the deceased, may be sued for the amount of the duty and interest, but only in his representative capacity and any judgment rendered against him in such capacity shall be executed against such property or money only.

### Property Not Disclosed.

Failure on the part of an executor or administrator to make full disclosure of the property passing on the death is penalized by the statutes of New Brunswick, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, and the Yukon Territory.

The Ontario Act provides that "if at any time it shall be discovered that any property was not disclosed upon the grant of letters probate or of administration, or the filing of the account, the person acting in the administration of such property, and the person who is liable for the duty payable under this Act, shall pay to the Treasurer the amount which, with the duty previously payable or paid on the property properly disclosed (or on the transmission thereof), shall be sufficient to cover the whole of the duty chargeable at the rates fixed by this Act, and shall at the same time pay to the Treasurer, as a penalty, a further sum of one hundred per centum of the duty chargeable on the property not disclosed (or on the transmission thereof), and shall also, within two months after the discovery of the omission, deliver to the Surrogate Registrar or the Treasurer an affidavit or account setting forth the property not so disclosed, and the value thereof, in default of which they shall each incur a penalty of \$10 for each day during which the default continues."

A similar provision is contained in the statutes of Manitoba, Saskatchewan, and the Yukon Territory, except that the penalty of one hundred per centum of the duty is reduced to twenty-five per centum and is described as a further duty. Moreover, in the Province of Manitoba and

in the Yukon Territory, the imposition of this further duty is discretionary on the part of the Minister.

The Alberta Act provides in relation to the non-disclosure of property as follows:—

“Any person making the affidavit in Form 1 in the schedule hereto, who, without reasonable excuse, the proof of which shall lie on him, either fails to include in the inventories attached to the affidavit any property of the deceased, or any property passing which is within the scope of any of the provisions of this Act, or who makes any incorrect statement therein with respect to the value or mode of passing of any such property or with respect to the degree of relationship to the deceased or the place of residence of any beneficiary, shall be guilty of an offence and shall be liable in an action brought against him by the Minister to pay an amount equal to the amount of any duty which should have been paid and has not been paid, arising by reason of such failure or incorrect statement.”

The statutes of New Brunswick and British Columbia contain similar provisions, except that in these provinces the person in default is liable for an amount equal to twice the duty payable in respect of the property omitted.

The undervaluation of property by executors or administrators renders them liable to certain penalties in the provinces of Alberta, New Brunswick, and Quebec.

The Alberta Act provides that any person who makes an affidavit with intent to deceive or mislead the Minister as to the amount of duty payable on any property, or who makes or causes to be made any affidavit or statement in which any property is valued at an undervalue or is omitted from the inventories shall be guilty of an offence and liable in an action brought against him by the Minister to pay an amount equal to the duty payable in respect of the property so undervalued or omitted.

The New Brunswick provision is similar except that the amount recoverable is double the duty payable in respect of the property undervalued or omitted.

The Quebec statute provides that if any false or incorrect statement is made, either as to the value or otherwise, every heir, legatee or donee so offending shall be liable to a penalty equal to twice the amount of the duties which he would have had to pay if he had made a proper declaration, and every executor, trustee or administrator so offending, shall be liable to a penalty of not more than \$1,000; and in default of the payment of such penalty in either case, the offender shall be liable to imprisonment for not more than one month, and the amount of the penalty may be levied out of his personal property.

Section 25e of the Ontario Act provides as follows:—

**25e.** Every person who wilfully makes any false statement in any statement, return, instrument, letter, note, telegram or other document or paper writing required by, filed with, mailed to or otherwise furnished to the Treasurer or to any officer or employee of the Government of Ontario in connection with any property passing on the death or property deemed to be property passing on the death of or any disposition of property by a deceased person, or in connection with any of the provisions of this Act, shall be guilty of an offence and liable to a penalty of not less than \$1,000 and not exceeding \$10,000 or to imprisonment for a period not exceeding two years or to both fine and imprisonment.

By section 29 of Chapter 94 of the Revised Statutes of Ontario, 1927, The Surrogate Courts Act, provision has been made whereby the Judge is to be satisfied that the estate is not undervalued and that transfers of dutiable property have not been made in contravention of the Succession Duty Act.

It is provided that any information or complaint in Ontario with respect to an offence against the provisions of the Act may be laid or made within five years from the time when the matter of the information or complaint arose. The penalties imposed by the Act may be recovered under The Summary Convictions Act and are payable to the Treasurer.

The Lieutenant-Governor in Council may remit in whole or in part, any of the penalties imposed.

### **Powers of Raising Duty.**

It is provided by the Ontario Act that "any person who may be required to pay the duty in respect of any property which has come into his possession, or is vested in him or is under his control shall, for the purpose of paying such duty or raising the amount of the duty when already paid, have power to raise the amount of such duty and any interest and expense property paid or incurred by him in respect thereof by sale, mortgage, or lease of so much of the property as may be necessary for such purpose."

The statutes of the other provinces, with the exception of Quebec, contain a similar provision.

Persons who may be required to pay the duty include executors, administrators, trustees and beneficiaries, provided the property is in the possession or control of, or is vested in the person from whom payment is required. In order to exercise the powers given, the leave of the Court is not essential.

### **Beneficiaries.**

Provision is made in all the statutes that a beneficiary shall be personally liable for the duty upon so much of the property as passes to him, or where the statute taxes the transmission or succession, in respect of that portion of the transmission or succession which relates to such property. Provision is also made for the deduction of the duty payable out of the share of the property which passes to him, and the executor or administrator is penalized if he fails to make such deduction. These features of the taxation, in so far as the Province of Quebec is concerned, have been emphasized in the following decisions, namely:—

*Lamarche v. Bleau* (1930), 3 D.L.R. 545; S.C.R. 198; reversing 46 Que. K.B. 450; affirming 67 Que. S.C. 168.

In this case it was held that the tax imposed by the Quebec Act is not a personal tax but a tax charged on the property passing and payable out of such property. Hence a usufructuary who personally pays the whole succession



duty is entitled to reimbursement out of the estate for the amount of duty which she has paid over and above the duty on her own share of the estate.

*Olivier v. Jolin*, 25 Que. K.B. 532.

It was held that when, as required by the statute relating to succession duties, one of the persons mentioned in Art. 1380, R.S.Q. 1909, has deposited with the collector of revenue the declaration required by that Article, and the collector has notified him of the amount that he should pay, such person does not become the debtor of the Government except in regard to such duties as may affect his share in the succession, but not for those duties which may affect the shares of other beneficiaries. Each of the beneficiaries in the succession is debtor for the duties charged upon his share therein without recourse against any person whomsoever. The assignment by an heir of his share in the succession, for consideration, constitutes an actual acceptance of the succession. The heir making the assignment cannot take exception to it in order to avoid the obligation on his part to make payment of the duties upon his share therein.

*Blache v. Levesque*, 35 Que. K.B. 30.

Held that in a succession transmitted in entirety to a single usufructuary, the bare ownership passing to her children, the succession duty must be paid by the usufructuary on the value of the estate at the time of death and not by the children each for his share.

The statutes of New Brunswick, Ontario, Manitoba, Alberta, and the Yukon Territory, provide that in the event of default on the part of a beneficiary in filing the affidavit of value and relationship within the prescribed time, such beneficiary shall incur a penalty of \$10 for each day during which the default continues.

The Quebec Act provides for the imposition of a fine equal to twice the duty upon the beneficiary in default, and that, in default of payment of such fine, the beneficiary shall

be liable to imprisonment for not more than one month. It is also provided that the fine may be levied on the personal property of the beneficiary.

Provision has been made in the statutes of New Brunswick, Manitoba, Alberta, and the Yukon Territory, whereby domiciled or resident beneficiaries are made personally liable in respect of the transmission to them of outside personal property in the following circumstances, namely:—

- (a) Where any beneficial interest in any personal property of a domiciled decedent situated outside of the province passes to a beneficiary domiciled or resident within the province; or
- (b) Where any beneficiary domiciled or resident within the province receives within the province as assignee or nominee any beneficial interest in any money payable under a policy of life insurance or a policy of accident insurance upon the life of a deceased who was domiciled or resident within the province at the time of his death, and where the policy was wholly kept up by the deceased for the benefit of any existing or future donee.

#### **Trustees, Guardians, and Other Persons.**

By section 56 of the Saskatchewan Act it is provided that where property passes on the death of the deceased and no executor can be made accountable for duty in respect of such property or in respect of the succession to such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the succession duty in respect of such property or in respect of the succession to such property, and shall within two months after the death

of the deceased or such later time as the Attorney-General allows deliver to the clerk of the Surrogate Court of the judicial district in which the said property is situate a statement to the best of his knowledge and belief of the property which statement shall be verified under oath.

The statutes of certain of the other provinces make mention of a trustee, guardian, committee, or other person, as being accountable for the duty.

It is doubtful whether an insurance company can be regarded as having the management of policy moneys within the meaning of this section. In order to escape any possible liability, however, an insurance company should retain sufficient money to meet the succession duty, or obtain the consent of the responsible Minister to payment of the policy moneys in full.

*Haas v. Atlas Insurance Company Limited*, W.N. (1913), 64; (1913), 2 K.B. 209; 82 L.J.K.B. 506; 108 L.T. 373; 29 T.L.R. 307.

In this case, a question arose as to whether the executor of the deceased was entitled to recover certain insurance money without producing a grant of representation from an English Court. In holding that the executor was so entitled, Scrutton, J., referred to the course of action which, in his opinion, insurance companies might take in reference to any duties that might be payable. He stated that as to Estate Duty, if it was payable, section 9 of the Finance Act, 1894, gave a charge to the extent of the duty on the moneys, and if the defendants retained out of the moneys an amount equal to the duty, they would not be going beyond their legal rights. The defendants could inform the Government, and then it might be decided in interpleader proceedings whether the Crown was entitled to Estate Duty or not.

The Saskatchewan Act provides that no liability shall attach to insurance companies in respect of the duty on insurance moneys, if such companies, before disbursing such moneys or any portion thereof, shall give fifteen days' pre-

vious notice thereof and supply such information to the Attorney-General in regard to such insurance as he may require, and comply with such terms and conditions as the Attorney-General may see fit to impose, before the expiration of said period of fifteen days, in regard to such portion of the succession duty as is or may be applicable to the policy moneys.

There is a statutory provision in certain of the provinces prohibiting insurance companies from paying over insurance moneys without the consent of the responsible Minister.

Section 9 of the Ontario Act prohibits the transfer of certain specified assets without the written consent of the Provincial Treasurer. It is provided, however, that notwithstanding anything contained in this section, an insurance company may make payment not exceeding \$1,100 due under a policy or policies of insurance which may be subject to duty in Ontario (or with respect to which there is a transmission within Ontario) without first obtaining the consent in writing of the Treasurer, and that, where such payment has been made, notice shall be transmitted to the Treasurer forthwith. If the payment does not exceed \$600, notice is not required.

In Quebec no insurer can make a valid payment of the insurance moneys until the succession duty has been paid and a certificate to that effect has been delivered. There are two exceptions to this general rule, namely:—

- (a) The Provincial Treasurer, or the Comptroller of Revenue, or the Collector of Revenue in and for the revenue district of Montreal, or the Provincial Collector of Succession Duties, may, up to the extent of \$1,000 and on such terms and conditions as may be deemed advisable, authorize the payment by an insurer before the payment of the duty or before the delivery of the certificate.

- (b) The Lieutenant-Governor in Council may, on such terms and conditions as he deems advisable, authorize the payment of insurance moneys by an insurer before the payment of the duty or before the delivery of the certificate.

Section 46 of the Manitoba Act provides that an insurer may make payment of insurance moneys to an amount not exceeding \$2,500; but otherwise an insurer is prohibited from making payment of insurance moneys in respect of which duty is payable without the written consent of the Minister.

The same provision is contained in the Yukon Territory Ordinance.

Section 61 of the Alberta Act requires insurance companies to give notice to the Minister of claims for insurance, and to comply with such conditions as the Minister may prescribe before making payment. This provision, however, does not apply to insurance claims not exceeding \$1,000 payable to beneficiaries of the preferred class. An insurer who fails to comply with this provision incurs a penalty not exceeding the duty payable to the province in respect of the insurance. Moreover, if the insurer does not prove that the contravention was not wilful, he incurs an additional penalty of \$1,000 recoverable by the Minister in an action in the Supreme Court.

The British Columbia Act permits of the payment of seventy per centum of the total insurance moneys before payment of the duty. Insurance companies may also make payment of insurance moneys to preferred beneficiaries, provided the payment does not exceed \$2,500, and a certificate is previously obtained from the Minister that the moneys are exempt from duty.

In Prince Edward Island there is a general prohibition upon insurance companies making payment of insurance moneys without the consent of the Provincial Treasurer. This rule does not apply in the case of policies not exceeding

\$5,000 payable to preferred beneficiaries, and in the case of policies not exceeding \$2,000 payable to ordinary beneficiaries, provided the insurer makes report to the Provincial Treasurer within seven days after payment.

By certain of the provincial statutes trustees are made specially accountable for succession duty.

The Quebec Act provides that every donation in trust must be declared by the trustee within sixty days of his learning of the death of the constituent of the trust. If a trustee violates this provision he is liable to a fine equal to twice the duty, when any duty is exigible, or to a fine of not more than \$1,000 when no duty is exigible. On failure to pay the fine, the offender is liable to imprisonment for not more than one month, and the amount of the fine may be levied on his personal property.

The statutes of Manitoba and the Yukon Territory provide that every person who holds property in trust for another, shall, upon demand of the Minister, file with him a return with respect to any person named in the demand, showing a correct and full itemized inventory of all property so held in trust, together with such other information as is demanded. If a trustee defaults in complying with the demand he is liable to a penalty of twenty dollars for every day during which the default continues.

The donee of a gift *inter vivos* is liable to account for and pay the duty upon such gift. *In re Crocker, Crocker v. Crocker* (1916), 1 Ch. 25; 85 L.J. Ch. 179; 114 L.T. 61.

A *donatio mortis causa* does not pass to the executor "as such," and the donee is liable for the duty in respect thereof. *In re Hudson; Spencer v. Turner* (1911), 1 Ch. 206; 80 L.J. Ch. 129; 103 L.T. 718.

An injunction can be obtained by the Crown to restrain the owner of property from parting with it until the duty has been paid. *Atty.-Gen. v. Wack*, Times, June 14, 1899; 43rd Int. Rev. Rep. p. 191.

### **Alienees and Derivative Owners.**

Alienees and derivative owners are made accountable for duty by section 56 of the Saskatchewan Act. The alienees may have obtained the property by transfer before or after the death. Derivative owners include the representatives of deceased beneficiaries.

Section 39 of the New Brunswick Act provides that where any property of any person which has previous to his death been conveyed or transferred to some other person is declared liable to duty, the Court in an action or on summary application may declare the duty to be a lien upon the property and may make such declaration although the amount of such duty has not been ascertained, and where any property which, had it remained in the hands of the person to whom or for whose benefit it was conveyed or transferred by such deceased person, would have been liable for duty, has been conveyed or transferred to any purchaser for valuable consideration, the Court may direct the person to whom or for whose benefit the said property was conveyed or transferred by such deceased person as aforesaid to pay the amount of the duty to which such property would have been so subject.

A similar provision is contained in the statutes of Manitoba, Saskatchewan, Alberta, British Columbia, and the Yukon Territory.

### **Corporations.**

Corporations are prohibited from transferring certain classes of property without the consent of the responsible Minister until the succession duty has been paid. Provision has also been made in some instances prohibiting the opening of safety deposit boxes, or the removal thereof from the province, without the written consent of the Minister.

### **Transfer of Securities.**

Section 31 of the British Columbia Act provides that "no foreign executor or administrator shall assign or transfer any stocks, debentures, or shares in the province standing

in the name of a deceased person, or in trust for him, in respect of which duty is payable under this Act, until the duty is paid to the Minister or security given as authorized by section 22, and any corporation allowing a transfer of any stocks, debentures, or shares, contrary to this section shall be liable to pay the duty payable in respect thereof, and interest thereon (if any)."

Section 9 of the Ontario Act provides that "unless the consent thereto, in writing, of the Treasurer is obtained, no bank, trust company, insurance company or other corporation having its head office, principal place of business, office from which payment of claims or debts are made, register of shareholders, or any place of transfer in Ontario, shall,—

- (a) Deliver, transfer, assign or pay, or permit any delivery, transfer, assignment or payment of any bearer bonds, bearer share warrants, bearer stock certificates, guaranteed investment certificates payable to bearer, company notes or other notes payable to bearer, receivables payable to bearer, credits or letters of credit payable to bearer or any other bearer securities whatsoever, belonging to a deceased person or in which such deceased person had any beneficial interest whatsoever, and which may be liable to duty in Ontario, or with respect to which there is a transmission within Ontario, whether such person died domiciled in Ontario or elsewhere;
- (b) Transfer, assign or pay, or permit the transfer, assignment or payment of any insurance moneys payable on the death of a person as a result of any contract of insurance entered into by such person in his lifetime, whether such policy of insurance is upon the life of such person or concerns him or his estate, or is upon the life of, or concerns another person or his estate, or as a result of any contract of insurance entered into by any person other than such deceased person, when such insurance moneys



may be liable for duty in Ontario, or with respect to which there is a transmission within Ontario, whether such deceased person died domiciled within Ontario or elsewhere;

- (c) Deliver, transfer, assign or pay, or permit any delivery, transfer, assignment or payment of any bonds, shares of stock, guaranteed investment certificates, company notes or other notes, receivables, credits or letters of credit, money on deposit in any bank, trust company office or office of any other institution, or any other securities or property whatsoever, belonging to a deceased person and standing in his name, or in his name and that of any other person, or held in trust for such deceased person, or for him and any other person, or in which such deceased person had any beneficial interest and which may be liable to duty in Ontario, or with respect to which there is a transmission within Ontario, whether such person died domiciled in Ontario or elsewhere."

The statutory provisions prohibiting the transfer of securities in New Brunswick and Saskatchewan are in similar terms to those contained in the Ontario Act.

If a corporation fails to comply with the provisions it is liable to a penalty equivalent to the amount of the duty payable. Moreover, if it is found that the contravention was wilful certain additional penalties are incurred. In New Brunswick, there is an additional penalty of \$500, this amount being increased to \$1,000 in Ontario and Saskatchewan. In Ontario no penalties are applicable if the Provincial Treasurer is satisfied that the contravention was not wilful.

The statutes of Nova Scotia and Prince Edward Island prohibit the registration of transfers of securities while the duty remains unpaid. If a corporation violates this provision it becomes liable to a penalty equivalent to twice the amount of the duty payable on such securities.

Subsection (2) of section 31 of the British Columbia Act enables a corporation to transfer stocks, debentures, or shares, to the persons entitled thereto if there is no other property in the province, upon payment of the duty and like fees as would be required to be paid under the Probate Duty Act, and upon production of letters probate or letters of administration granted by a Court of competent jurisdiction outside the province, and an affidavit that all debts of the deceased within the province have been paid.

Section 14 of the Quebec Act provides that until the duty has been paid no person or corporation, or transfer agent for a corporation, shall accept or register in his or its books any transfer or transmission of shares or registration of bonds and other obligations. If a corporation violates this provision it becomes liable to a fine equal to twice the amount of the duty, when any duty is exigible, or to a fine of not more than \$1,000 when no duty is exigible, and, on failure to pay such fine in either case with the costs, the offender—and if the latter be a corporation, its president or manager—is liable to imprisonment for not more than one month, and the amount of the fine and costs may be levied on his personal property.

### **Transfer of Other Properties.**

In addition to the prohibitions regarding the transfer of securities, the statutes in some instances prohibit the transfer of other properties passing on the death of a deceased person until the duty payable in respect of such properties has been paid.

Section 9 of the Ontario Act provides that unless the consent in writing of the Provincial Treasurer is obtained,—

- (a) No person (whether or not acting in any fiduciary capacity) shall deliver, transfer, assign or pay, or permit any delivery, transfer, assignment, or payment of any chattel mortgages, book debts, promissory notes, moneys, shares of stock, bonds, or other

securities whatsoever (whether registered or unregistered) belonging to a deceased person, or in which such deceased person had any beneficial interest whatsoever, and which may be liable to duty in Ontario, or with respect to which there is a transmission within Ontario, whether such deceased person died domiciled in Ontario or elsewhere. This provision, however, does not apply to any person when acting solely in the capacity of executor.

- (b) No person acting in the capacity of executor shall deliver, transfer, assign or pay, or permit any delivery, transfer, assignment or payment of any book debts, notes, receivables, moneys, cash in bank, shares of stock, bonds, chattel mortgages or other securities whatsoever, when such property, or any of such property, was held by him in trust for a beneficiary who has died (domiciled either in Ontario or elsewhere) or in trust for the ultimate benefit of such deceased beneficiary upon realization, or when such deceased beneficiary had any beneficial interest whatsoever in such property, or any of such property, and when such property, or any of such property, may be liable to duty in Ontario, or with respect to which there is a transmission within Ontario.

Section 48 of the New Brunswick Act provides that unless the written consent of the Minister or his representative is obtained no person shall deliver, transfer or assign or permit any delivery, transfer or assignment of any property whatsoever belonging to a deceased person which may be liable to duty in the province, including any deposit, bond, debenture stock, stock or share with, in, issued by or payable by any bank, trust company, insurance company, or other corporation and standing in the name of the deceased person (whether such deceased person died domiciled in the province or elsewhere) or held in trust for him or in the names of a deceased person and any other person.

A similar provision is contained in the statutes of Manitoba, Alberta and Prince Edward Island.

Subsection (4) of section 27 of the British Columbia Act provides that "Subject to the provisions of section 97 of the 'Bank Act' of the Dominion no bank, trust company, mortgage corporation, savings and loan association, barrister, or solicitor, owing moneys to which the deceased was entitled either solely or jointly with another person, or having in its or his possession or charge any property to which the deceased was entitled either solely or jointly with another person, shall pay over or deliver that money or property to the executor or administrator of the deceased, or to any other person, without the written consent of the Minister thereto." Any violation of this provision makes the person or corporation in default liable, on summary conviction, to a fine not exceeding \$1,000, and an additional fine not exceeding the amount of the duty and interest imposed in respect of the money or property paid over or delivered. No fine is imposed if the person or corporation charged with the offence is shown to have had no notice or knowledge of the death of the deceased.

The Quebec Act provides that until the succession duty has been paid, and a certificate to that effect has been delivered,—

- (a) No executor, trustee, administrator, curator, heir, legatee, or donee, shall consent to any transfer or payment of legacy;
- (b) No insurer may make a valid payment of the amount due by reason of a death; and
- (c) No depositary may remit or transfer to another name any money deposited in a personal or joint account.

The Act further provides that, subject to the provisions of section 13, no transmission of any property belonging to any deceased person at the time of his death shall take place nor shall any transfer thereof be valid, nor shall any title

therein or thereto vest in any person, unless and until the succession duty has been paid in full, and unless a certificate, describing the property, to the effect that such duties have been paid or that none are exigible, has been delivered by the proper official.

The fact that title to estate property in Quebec cannot be obtained until the succession duty has been paid receives illustration in the following cases, namely:—

*Hickey v. Spollen*, 55 D.L.R. 691; 58 Que. S.C. 286; 22 Que. P.R. 235.

The plaintiff, Edward Hickey, was one of the legal heirs of Mrs Julia Hickey, who died intestate about March 8, 1918, and the plaintiff, Andrew Knox, alleged that he was subrogated to the rights of other heirs under deeds of transfer. They claimed the property of the inheritance which was in the possession of the defendants.

The defendants pleaded that no declaration of death was made or registered after the death of Mrs. Hickey, and that the succession duties payable upon the property had never been paid, and that for these reasons the transfers granted to the plaintiff, Andrew Knox, by some heirs were invalid, and gave him no title.

It was held that the transfer of their rights by the heirs to Andrew Knox while the succession duties remained unpaid was illegal and would be set aside. The plaintiff, Edward Hickey, being one of the co-heirs of Mrs. Julia Hickey, was held entitled to a return of most of the goods claimed or their value.

*Galarneau v. Brochu*, 24 Que. P.R. 283.

When Art. 1381 (as amended) R.S.Q. says that no transfer of the estate of a succession is valid and no title is thereby given unless the succession duties have been paid, it does not affect the simple devolution or transmission of the goods of the deceased to his heirs or legatees. He who invokes ownership by right of succession is not obliged to allege and prove that he has paid the succession duties to

the Government. The nullity of his title for this reason must be alleged and proven by his adversary. This omission cannot be invoked by inscription in law.

*Viau v. Viau*, 45 Que. K.B. 177.

The invalidity of a conveyance of the property forming part of a succession, where the succession duties have not been discharged, has no application in the case of a transfer by the heir; it only affects the transmission of the property of the deceased.

*Turner ès-qualité v. Leavitt*, 73 S.C. 521.

This was an action for rent. The defendant alleged that the plaintiff had no right of action as the succession duties had not been paid on the estate of the lessor. It was held that the plaintiff must allege and prove that the duties had been paid or that none were exigible, and, as he admitted in his deposition that no return had been made, his action was dismissed *sauf à se pourvoir*.

*Dame Meunier v. L'Heureux*, 74 S.C. 460.

A universal legatee cannot sue for the recovery of a note payable to the *de cuius* unless the succession duties have been paid. This rule is in favour of the treasury not of the debtor and an offer by the debtor to settle the claim does not prevent his raising the defence.

*Connolly v. Estate Michael Connolly Corp.* (1936), 40 Q.P.R. 36 (S.C.).

An heir cannot sue in Quebec Courts to claim a part of estate without proving succession duties have been paid. He cannot, by simple petition, demand that shares inherited by him be transferred to him in the books of an incorporated company. He should proceed by action.

#### Transfer of Corporation Assets.

The Nova Scotia Act provides that when succession duty is payable in respect of the shares of any corporation, such corporation shall not, without the written consent of the

Provincial Treasurer, distribute among, transfer or deliver to any person, firm or corporation,—

- (a) any of its assets in specie, nor
- (b) any moneys held or received by it that are assets of the corporation, nor
- (c) any of its assets or money in payment or discharge of any of its liabilities.

The penalty for violation of this provision is an amount equivalent to twice the duty payable in respect of the shares.

The Act further provides that if duty is payable in respect of the shares of a family corporation, and such family corporation holds any securities issued by a corporation incorporated in Nova Scotia or having a place of registry in Nova Scotia, the Provincial Treasurer may serve notice upon the issuing corporation forbidding the transfer of the securities held by the family corporation until the duty payable in respect of the shares of the family corporation have been paid. If any corporation transfers securities contrary to the notice thus served, it becomes liable to a penalty equal to twice the amount of duty payable in respect of the shares issued by it.

Corporations are required to furnish such information as the Provincial Treasurer may desire, and any failure to supply such information renders the corporation in default liable to a penalty of \$25 for each day it so fails.

#### **Transfer of Limited Amounts.**

Provision is made by the Ontario Act that the consent of the Provincial Treasurer is not required for the payment of one-half of joint moneys to the survivor, or \$500 of such joint moneys (whichever is the lesser amount) provided the banking or other institution concerned notifies the Provincial Treasurer immediately on such payment being made. A similar provision is contained in the Saskatchewan Act.

The Quebec Act provides that moneys deposited in a personal or joint account, to the extent of \$1,000 may be transferred before the succession duty is paid, if such transfer is authorized by the proper official.

In Manitoba payment of joint deposits to the extent of \$500 is permitted without the written consent of the Minister.

### Safety Deposit Box.

The statutes of Ontario, New Brunswick, Manitoba, Saskatchewan, Alberta, and British Columbia, require notice to be given to the responsible Minister by the executor or administrator before the securities of a deceased person deposited in a safety deposit box can be removed therefrom.

Section 48 of the New Brunswick Act provides as follows:—

48.—(1) Unless the consent thereto in writing of the Minister or his representative is obtained, no person shall,—

(b) permit the opening of any safety deposit box in the province or the removal thereof from the province where such safety deposit box contains any negotiable instrument, certificates representing indebtedness under bond or otherwise or representing any holdings of stock, muniment of title, insurance policy or any other property belonging to a deceased person, or permit the withdrawal from a safety deposit box in the province of anything mentioned in this clause; or

(c) deliver up or part with the possession of any property belonging to a deceased person which is at the time of the death of that person held by him for safe keeping.

(2) Notice in writing of the intention to open up any such safety deposit box or to withdraw anything therefrom or to deliver up or part with the possession of any property held for safe keeping as aforesaid shall be served on the Minister or his representative at least ten days, or other period to which the Minister may agree, before such opening, withdrawal, delivery or parting with possession is to take place, and the Minister or his representative may attend at the time and place aforesaid and there give a consent in writing thereto, and he may examine the contents thereof, or the Minister may give such consent without so attending and examining as herein provided.

### Lien for Succession Duty.

Provision has been made by the statutes making succession duty a lien upon the property passing on the death of a deceased person until the duty has been paid. As a rule,



each particular item of property is only charged with its proportionate part of the duty, but in some cases the lien is of a general character and attaches to all the property owned by the deceased at the time of his death.

The statutory provisions creating the lien or charge may be briefly summarized as follows:—

*Ontario:—*

- (a) The duty, or so much thereof as remains unpaid, with interest thereon, shall be and remain a lien upon the property in respect of which it is payable until paid.
- (b) The Provincial Treasurer may cause to be registered in the proper registry office, or in the proper office of land titles, a caution claiming duty in respect of any land, or money secured by mortgage, or charge upon land.
- (c) The provision respecting the filing of a caution shall not affect the rights of the Crown to a lien independently of the caution.
- (d) A certificate purporting to be a discharge of the whole duty payable in respect of any property included in the certificate shall exonerate from duty property in the hands of a *bona fide* purchaser for valuable consideration without notice.
- (e) Subject to the provisions of section 9 of the Succession Duty Act, section 55 of the Registry Act, and section 61a of the Land Titles Act, no property or any interest therein which has been acquired by or transferred to any person in good faith for valuable consideration and without notice, shall be subject to any lien or charge for duty.

*Quebec:—*Until the succession duty has been paid and a certificate to that effect has been delivered and has been registered or deposited, no registrar may enter in his books the transmission of any immovable property belonging to any deceased person at the time of his death or of any debt

affecting in favour of such deceased person any immovable property, by privilege or hypothec, nor the transfer of any such immovable property or debt, nor the discharge of any such debt.

*Nova Scotia:—*

- (a) The duty, or so much thereof as remains unpaid, with interest thereon, shall be and remain a lien upon the property in respect of which it is payable until paid.
- (b) The Provincial Treasurer may cause to be registered in the office of the proper Registrar of Deeds a caution claiming duty in respect of any real property or any estate or interest therein.
- (c) The provision respecting the filing of a caution shall not affect the rights of the Crown to a lien independently of the caution.
- (d) A certificate purporting to be a discharge of the whole duty payable in respect of any property included in the certificate shall exonerate from duty property in the hands of a *bona fide* purchaser for valuable consideration without notice.

*New Brunswick:—*

- (a) The duty payable in respect of any property in the province, together with interest thereon, shall be and remain a lien and charge in favour of the Crown until the duty has been paid in full.
- (b) In case the person liable for the payment of duty in respect of the passing to him of a beneficial interest in personal property situate without the province is also liable for the payment of duty upon property situate within the province, the interest of that person in the property in the province shall be subject to a lien and charge in favour of the Crown for the full amount of all duties for which that person is liable until such duties have been paid.

- (c) The Minister may cause to be filed in the office of the proper Registrar of Deeds a notice of lien claiming duty in respect of any land or any money secured by any mortgage or encumbrance upon land. The Registrar is required to register this notice of lien upon receipt, and such registration has the same effect as to priority of the lien as the registration of any instrument under The Registry Act.
- (d) The Minister may withdraw the notice of lien at any time, but any such withdrawal shall be without prejudice to the right of the Minister to file any further or other notice, if deemed necessary.
- (e) The provisions respecting the filing of a notice of lien shall not affect the rights of the Crown to claim a lien independently.

*Prince Edward Island:—*

- (a) The duty imposed by the Act or so much thereof as remains unpaid with interest thereon shall be and remain a first lien upon the property in respect of which it is payable until it is paid;
- (b) Where duty is claimed in respect of any real property or any estate or interest therein, the Provincial Treasurer may cause to be registered in the office of the proper Registrar of Deeds a caution claiming duty in respect of such real property or estate or interest therein;
- (c) The provision respecting the filing of a caution shall not affect the rights of the Crown to a lien independently of the caution;
- (d) A certificate purporting to be a discharge of the whole duty payable in respect of any property included in the certificate shall exonerate from duty property in the hands of a *bona fide* purchaser for valuable consideration without notice.

**Manitoba:—**

- (a) The duty imposed on property in the province shall be and remain a lien in favour of the Crown on such property until paid.
- (b) Notwithstanding that security for the duty has been given, the lien remains in full force and effect until payment has been made.
- (c) The lien does not attach to any property which has been transferred to a *bona fide* purchaser for value without notice thereof.
- (d) A certificate purporting to be a discharge of the whole duty payable in respect of property shall exonerate from duty the property in the hands of a *bona fide* purchaser for valuable consideration without notice.
- (e) The Minister may cause to be filed in the land titles office or registry office for the district in which land subject to duty is situate, or in which a mortgage or encumbrance so subject is registered, a notice of lien executed by him on behalf of the Crown.
- (f) The notice of lien may be withdrawn at any time, but, notwithstanding such withdrawal, the Minister may file a further notice if he deems it necessary.

**Saskatchewan:—**

- (a) The duty, or so much thereof as remains unpaid, with interest thereon, shall be and remain a lien upon the property in respect of which it is payable until paid.
- (b) Notice of lien may be filed in the proper land titles office whenever it is claimed that any land or any money secured by any mortgage or encumbrance upon land is or may be subject to duty.
- (c) The notice of lien may be withdrawn at any time, but without prejudice to the right to file a further notice if deemed necessary.

- (d) Nothing contained in the Act respecting the filing of a notice of lien shall affect the rights of the Crown to claim a lien independently.
- (e) Any duty payable out of any portion of the estate of a deceased person shall be a lien in favour of the Crown on and against all the property of the deceased in the province.
- (f) Notwithstanding the giving of security for payment or the duty, the lien remains in full force and effect until payment has been made.
- (g) The lien for duty shall not affect the title of a *bona fide* purchaser or mortgagee of land or any interest therein for valuable consideration without notice.
- (h) The lien for duty shall not affect the title of a tax sale purchaser unless in circumstances amounting to collusion.
- (i) If a surety or guarantee company pays the duty he is subrogated to all the rights of the Crown.
- (j) A certificate purporting to be a discharge of the whole duty payable in respect of property included in the certificate shall exonerate from duty property in the hands of a *bona fide* purchaser for valuable consideration without notice.

**Alberta:—**

- (a) The duty payable in respect of property in the province, together with interest thereon, remains a lien in favour of the Crown on and against that property until payment has been made.
- (b) The lien does not attach to any property transferred to a *bona fide* purchaser for valuable consideration without notice thereof.
- (c) Where a person domiciled in the province is liable for duty in respect of the transmission to him of a beneficial interest in the outside personal property of a domiciled decedent, and such person is also

liable for duty in respect of property situate in the province, the interest of that person in the property in the province shall be subject to the Crown lien for the full amount of all duties for which that person is liable.

- (d) The Minister may file a notice of lien in the proper land titles office whenever it is claimed that any land or any money secured by any mortgage or encumbrance upon land is subject to duty.
- (e) The notice of lien may be withdrawn at any time, but such withdrawal shall not prevent the Minister from filing a further notice if deemed necessary.
- (f) The provisions respecting the filing of a notice of lien do not affect the rights of the Crown to claim a lien independently.

*British Columbia:—*

- (a) The duty payable in respect of property in the province, together with interest thereon, remains a lien in favour of the Crown on and against that property until payment has been made.
- (b) Where more than one parcel of property subject to duty passes to the same person, each parcel is subject to a lien for the total duties and interest imposed in respect of all the parcels passing to that person.
- (c) Where the person liable for any duty in respect of the transmission of any beneficial interest in personal property situate without the province is also liable for duty in respect of property of the same deceased situate within the province, the property in the province passing to that person is subject to a lien for the full amount of all duties and interest for which that person is liable.

- (d) The Minister may cause to be lodged in the proper Land Registry Office a *caveat* stating that a lien for succession duty is claimed in respect of any land, mortgage or charge upon land.
- (e) No lien upon any land or money secured by mortgage or charge on land for succession duty shall remain in force after the expiration of six months from the date of the issuing or resealing of probate or letters of administration, or after the expiration of six months from the date of the filing of the first affidavits of value and relationship, whichever period expires last, unless a *caveat* has been filed.
- (f) The giving or acceptance of security for the duty does not affect the lien in favour of the Crown.
- (g) Upon the payment of duty to the Crown pursuant to security, the person making the payment is subrogated to all the rights and privileges of the Crown.

*Yukon Territory:—*

- (a) The lien for duty remains in full force until all duty and interest levied in respect of the property covered thereby have been paid.
- (b) The lien does not attach to property which has been transferred to a *bona fide* purchaser for value without notice thereof.
- (c) A certificate purporting to be a discharge of the whole duty payable in respect of property shall exonerate from duty the property in the hands of a *bona fide* purchaser for valuable consideration without notice.
- (d) The Treasurer may cause to be filed in the Land Titles Office a notice of lien upon any land, or in respect of a mortgage or encumbrance upon land.

### Lien Affects Particular Property.

It will be observed that the statutes usually provide that succession duty shall be and remain until paid a lien upon the property in respect of which it is payable. It is considered that this provision means that each parcel of estate property is only charged with an aliquot part of the duty measured by the ratio which the value of that parcel bears to the value of the estate as a whole. See *Rex v. Caledonian Insurance Company* (1924), S.C.R. 207, per Idington and Anglin, JJ. The lien created by the Saskatchewan statute is, however, more extensive in its operation, as it is provided by that statute that any succession duty payable by, from, or out of any portion of the estate of a deceased person shall be a lien upon all the property of the deceased.

It is provided by the British Columbia Act that where more than one parcel subject to duty passes to the same person each parcel shall be subject to a lien for the total duties and interest imposed in respect of all the parcels passing to that person.

The statutes of Alberta and New Brunswick provide that the registration of a notice of lien shall have the same effect as to priority as the registration of any instrument under the Registry Act. It is somewhat difficult to reconcile this provision with the further enactment that the procedure regarding the filing of a notice of lien, whether or not such procedure is followed, shall not affect the right of the Crown to claim a lien independently. The filing of a notice of lien is not obligatory on the part of the Crown. If such a notice is not filed, doubtless the Crown can rely on the general statutory provision that "such duties together with the interest thereon shall be and remain a lien upon the property in respect of which they are payable, until the same are paid." There may be some question, however, as to whether this general statutory lien would prevail against the title of a *bona fide* purchaser for value without notice of the claim of the Crown. It is suggested that any intending purchaser of estate land would do well



to ascertain if the succession duty has been paid in respect thereof before completing his purchase, and thus remove any doubt as to whether or not a lien for duty actually exists. The statutes of Ontario, Nova Scotia and Saskatchewan provide that the lien for duty shall not affect the title of a *bona fide* purchaser for value without notice. The Saskatchewan Act also provides that the lien shall not affect the title or interest of a tax sale purchaser, unless in circumstances amounting to collusion between such purchaser and those interested in the estate.

In British Columbia the lien is completely effective, even without registration, until after the expiration of six months from the date of the issuing or resealing of probate or letters of administration, or after the expiration of six months from the date of the filing of the first affidavits of value and relationship. If the lien is to continue subsequently, the Act requires a caveat to be filed.

Apart from the statutory lien, it is considered that in those provinces where the Torrens system of land registration prevails the Crown is not precluded from claiming succession duty as a "tax, rate, or assessment" under the exceptions to the conclusiveness of a certificate of indefeasible title. In the Ontario Land Titles Act specific mention is made of succession duty as one of these exceptions. In British Columbia the exceptions include "any provincial tax, rate, or assessment," and in Saskatchewan, "all unpaid taxes." When "taxes" are generally spoken of—if the subject-matter will bear it,—they shall be intended Parliamentary taxes given to the Crown. *Brewster v. Kidgill*, 12 Mod. 167. See also *Louch v. Peters*, 1 My. & K. 489, where a testatrix gave to L. for life an annuity of £500 to be paid half-yearly, out of real estate, clear of all taxes and outgoings, and it was held that the annuitant took the annuity clear of legacy duty. Per Brougham, C.: "To deny that the legacy duty is an outgoing surely seems strong, especially in reading a will; but to doubt that it is a tax appears really a subtlety that passes all understanding."

The exceptions to the conclusiveness of a certificate of indefeasible title mentioned in the Manitoba Real Property Act include "any municipal charge, rate or assessment." There is no mention made of succession duty or taxes in general in this Act, and it would accordingly appear that in Manitoba succession duty is not included.

The giving of a surety bond to cover succession duty and the acceptance thereof by the Crown relieves real property sold in the lifetime of the deceased under agreement for sale from any claim for a lien by the Crown in respect of such duty, if the vendee is willing to carry out the agreement.

*Rex v. Caledonian Insurance Company* (1924), S.C.R. 207, affirming (1923), 3 W.W.R. 925.

This was an appeal from the decision of the Court of Appeal for British Columbia, affirming the judgment of McDonald, J., and granting a petition by the Caledonian Insurance Company under the Land Registry Act for an order upon the Registrar to register a title to certain land. The Supreme Court of Canada affirmed the judgment of the Court of Appeal.

Thomas Sheriff Higginson, who died in September, 1911, and whose will was proved in November of that year by one Burdis, who was named one of his executors, had, before his death, sold to William H. Stonehouse and Frederick G. Carlaw for the sum of \$6,000 certain real estate under an agreement for sale, under which there was owing at the time of his death the sum of \$1,207.84 for principal and interest. The purchase having been completed by payment of the purchase money and conveyance of the land to the purchasers, the title passed by several further conveyances to one George Allan Arbuthnot, who became the registered owner in indefeasible fee. Arbuthnot having mortgaged the land to the Caledonian Insurance Company, foreclosure proceedings were ultimately taken by that company, and a final order for foreclosure having been obtained by the 29th May, 1922, an application was made to the Registrar of Titles for the registration of the company as owner in fee simple.

It then appeared that on the 5th June, 1922, after the final order for foreclosure had been obtained a caution had been filed by the Minister of Finance, professing to act under the authority of sec. 50 of the "Succession Duty Act," in which it was declared that succession duty was claimed by the Minister in respect of the land in question.

The principal judgment was delivered by Duff, J., who stated, *inter alia*: "It was upon this interest of the testator, the purchase money, that the lien, if lien there was, attached. Assuming that the purchasers were bound to see to the application of the purchase money in payment of the duty, then their responsibility was a personal responsibility which did not in any way attach to the property, and the burden of it did not pass to their grantees. This alone would be sufficient to dispose of the appeal, but it is sufficiently clear to me that the statute cannot be held to impose upon debts payable to the executor, recoverable by him *virtute officii*, a charge while still in the hands of the debtor in such fashion that the debtor must ascertain at his peril, before paying his debt to the executor, that the duty has been paid. The statute contemplates the payment of the duty or the giving of a bond as security for the payment of the duty as the condition of granting probate. *Prima facie* the executor, upon a grant of probate, is clothed with authority to receive and give a good discharge for moneys payable to him in his capacity as executor, and it can, I think, never have been contemplated that in addition to the authority conferred by probate or letters of administration, the legal personal representative must receive from the Crown some additional authority enabling him as agent of the Crown to give a discharge to persons indebted to the estate for the moneys which it is his official duty to get in. During the argument, I was inclined to think that the language of sec. 50 was a serious obstacle for the respondent. Further consideration, however, convinced me that, rightly construed, that section is not at all inconsistent with the view I have expressed. The effect, no doubt, is that where land or money secured by a mortgage, or a charge upon land is

subject to a lien for the duty, then the proceedings therein specified may take place. This, as pointed out by the learned Chief Justice of the Court of Appeal in his judgment, is not necessarily inconsistent with the idea that where probate or letters of administration have been granted, the legal personal representative may be entitled to get in the property of the estate and to perform other acts of administration *virtute officii* without encountering the lien as a hindrance at every stage of his proceedings. If the foregoing reasoning be correct, then as a rule money secured by a mortgage or charge upon land in favour of the testator would be an asset which it would be the duty of the executor to realize; and land, if subject to an agreement for sale executed by the testator in his lifetime, which the vendee was able and willing to carry out, and in respect to which he desired to pay the purchase money to the executor, would not be an asset which could be affected by proceedings under this section."

Anglin and Idington, JJ., gave judgment that upon the taking of security for succession duties the lien of the Crown therefor is superseded. It will be noted, however, that the judgment of Duff, J., which was concurred in by Mignault and Malouin, JJ., was not based on this ground.

*In re Crawford Estate* (1918), 1 W.W.R. 267; 25 B.C.R. 178.

In this case Murphy, J., of the British Columbia Supreme Court, gave judgment that the lien given the Crown was not confined to the period previous to the issue of Letters Probate.

Section 26 of the British Columbia Act was amended in 1923 by adding thereto the following:—

"The giving or acceptance of security pursuant to this Act for the payment of succession duty shall not affect any lien under this Act in favour of the Crown, and upon the payment of succession duty to the Crown pursuant to security so given the person making the payment shall be subro-

gated to all rights, liens, powers, and privileges in respect of the succession duty so paid to which the Crown was entitled by virtue of this Act prior to the payment, and may enforce the same by action in his own name."

A similar provision that the giving or acceptance of security is not to affect the lien for duty is contained in the statutes of Manitoba, Saskatchewan, Alberta and Prince Edward Island.

### Certificates of Discharge.

In certain cases the responsible Minister is given power to grant certificates of discharge. By sec. 14 of the Ontario Act it is provided that when the duty or any part thereof has been paid or secured to the satisfaction of the Treasurer, he shall, if required by the person accounting for the duty, give a certificate to that effect which shall discharge from any further claim for duty the property mentioned in the certificate. The Provincial Treasurer is not bound to grant such certificate until the expiration of one year from the death of the deceased. A similar provision is contained in the statutes of Alberta, Nova Scotia, Saskatchewan, Prince Edward Island, and the Yukon Territory. It is noteworthy that the Certificate only discharges the property, and that the Crown is not precluded from claiming additional duty from the accountable person if it afterwards appears that such further duty is payable. It is provided that the certificate is not to discharge any person or property from the duty in case of fraud or failure to disclose material facts, and that it is not to affect the rate of duty payable in respect of any property afterwards shown to have passed on the death, the duty in respect of such property to be at such rate as would be payable if the value thereof were added to the value of the property, in respect of which duty had been already accounted for.

Power is given, by certain of the statutes, to the responsible Minister, upon the application of a person entitled to an interest in expectancy, to commute the duty which would

become payable in respect of such interest, and accept a certain sum in cash. On receipt of this sum, the Minister issues a certificate of discharge.

The responsible Minister is also empowered to compound the succession duty in circumstances where, owing to the number of deaths or the complicated nature of the interests of different persons, it is difficult or unduly costly to ascertain the exact amount of the duties payable. See subsection 7 of section 16 of the Ontario Act. Upon receipt of the amount thus compounded, the Minister must give a certificate of discharge.

## CHAPTER XIV.

### PAYMENT OF SUCCESSION DUTY AND RECOVERY PROCEDURE.

The statutory provisions regarding payment of succession duty and procedure for recovery thereof may be summarized under the following headings, namely:—

1. Date when succession duty is payable, and rate of interest.
2. Security for payment of duty.
3. Interest allowed for pre-payment.
4. Extensions of time.
5. Assessment.
6. Further information.
7. Refunds.
8. Action for recovery.
9. Summary application.
10. Rules and Regulations.

#### **Date When Succession Duty Payable.**

The following is a synopsis of the statutory provisions with regard to the date when succession duty is payable, and the rate or rates of interest charged on outstanding duties:

*Alberta, British Columbia, Manitoba, and the Yukon Territory:*—Due and payable at the death of the deceased. If the duty is paid within six months after the death, no interest is charged, but if not so paid interest is charged at the rate of six per centum per annum from the date of death until payment.

*New Brunswick:*—Due at the death of the deceased, and payable to the Treasurer within six months thereafter. If duty is paid within six months no interest is charged, but if not so paid interest is charged at the rate of five per centum per annum from the date of death until payment.

*Nova Scotia*.—Due at the death of the deceased and payable within eighteen months thereafter. If the duty is paid within eighteen months, no interest is charged, but if not so paid interest is charged at the rate of seven per centum per annum from the date of death until payment.

*Ontario*.—Due at the death of the deceased and payable within six months thereafter. If the duty is paid within six months, no interest is charged, but if not so paid interest is charged at the rate of six per centum per annum from the date of death until payment.

*Saskatchewan*.—Due and payable at the death of the deceased. If duty is paid within twelve months, no interest is charged, but if not so paid interest from the date of death is charged at the rate of six per centum per annum.

*Prince Edward Island*.—The same provisions apply as under the Nova Scotia statute, except that the rate of interest is five per centum per annum.

*Quebec*.—Payable within thirty days after the collector of succession duties forwards demand. Legal interest is charged on the duty after four months from the date of the death.

### Security for Payment of Duty.

The statutory provisions relating to the furnishing of security for the payment of succession duty are as follows:—

#### *Alberta and New Brunswick*.—

(1) The Minister may accept from any person tendering the same any security satisfactory to the Minister for securing the payment of the duties imposed by this Act, or of any part of those duties.

(2) Any person liable as surety or guarantor under any security so accepted by the Minister who pays the duty to the Minister pursuant to the security shall be subrogated to all rights, liens, powers and privileges in respect of the duty so paid to which the Minister or the Crown was entitled by virtue of this Act prior to the payment and may enforce the same by action in his own name.



*British Columbia:—*

(1) The Minister may accept security from any person tendering the same for securing the payment of the duty imposed by this Act in any case, or of any part of that duty.

(2) The security, if by way of a bond or guarantee, shall be on such form, for such sum, and with such sureties or otherwise as the Minister may approve, and, if by way of the deposit of securities, shall be of such character and valuation and subject to such terms as he may approve; and the security shall be deposited in the Treasury at Victoria.

(3) Subject to any certificate of discharge given by the Minister, the giving or acceptance of security pursuant to this Act for the payment of succession duty shall not affect the right of the Minister to require and enforce payment of the duty by any person or out of any property by any means otherwise available therefor.

*Manitoba and Yukon Territory:—*

The Lieutenant-Governor in Council (or the Treasurer, in the Yukon Territory) may, on the application of a person liable for the payment of duty, authorize the Minister to accept a bond in such form as the Lieutenant-Governor in Council approves for the whole amount of duty due or for the amount that may become due upon the happening of a contingency, or may authorize him to accept a portion of the duty due or to become due together with a bond for the balance.

*Ontario:—*

The Treasurer may accept a sufficient sum as security for the due payment of any duty, and he may in such case allow to the depositor interest thereon at a rate not exceeding four per centum per annum upon so much thereof as from time to time exceeds the amount of duty which has become payable under this Act.

*Saskatchewan:—*Section 25 of the Act provides that if the duty has not been paid by the successors or if security by a deposit of money has not been given, the applicant or applicants shall furnish a bond in such amount as the Attorney-General determines, to be executed by the applicant or applicants and either two sureties approved by the clerk of the Surrogate Court or a guarantee company approved by the Lieutenant-Governor in Council. The Attorney-General

may accept either a deposit in cash or provincial bonds on certain conditions for the due payment of the duty in lieu of or in addition to any other security. No security is required in the case of estates in respect of which no duty is payable, or in estates where the applicant is an approved trust company.

*Prince Edward Island*:—"Notwithstanding any of the provisions of The Succession Duty Act, 1925, or of the Act 24 Geo. V., ch. 25, the Treasurer may accept from any person tendering the same, any security satisfactory to the Treasurer for securing the payment of the duties imposed by The Succession Duty Act, 1925, in any case or of any part of these duties."

#### **Interest Allowed for Pre-payment of Duty.**

There is no provision for the allowance of interest for prepayment of duty in the statutes of Quebec, Saskatchewan, British Columbia, and the Yukon Territory. In the other provinces, the statutes provide for such an allowance being made, as follows:—

*Alberta and New Brunswick*:—"On payment of any duty before the time when liability for interest thereon arises, the Minister may allow to the person liable for payment of the duty interest at a rate not exceeding four per centum per annum upon the amount so paid from the time of payment to the time when liability for interest would otherwise have arisen."

*Ontario and Manitoba*:—"For payment before the time when liability for interest arises, the Minister may allow to the person accountable for the duty interest at a rate not exceeding four per centum per annum upon the amount so paid."

*Nova Scotia*:—"If any duty is paid before six months have elapsed from the death of the deceased, the Treasurer may allow the person liable for the duty interest at a rate not exceeding five per centum per annum upon the amount so paid from the date of payment to the expiration of

eighteen months from the death of the deceased. If any duty is paid after six months, but before twelve months have elapsed from the death of the deceased, the Treasurer may allow to the person liable for the duty interest at a rate not exceeding four per centum per annum upon the amount so paid from the date of payment to the expiration of eighteen months from the death of the deceased. If any duty is paid after twelve months, but before eighteen months have elapsed from the death of the deceased, the Treasurer may allow to the person liable for the duty interest at a rate not exceeding three per centum per annum upon the amount so paid from the date of payment to the expiration of such eighteen months."

*Prince Edward Island*:—"If any duty is paid before the time provided for, the Treasurer may allow to the person liable for the duty interest at a rate not exceeding three per centum per annum upon the amount so paid from the date of payment to the expiration of such eighteen months."

#### **Extensions of Time.**

The statutes of Ontario, Manitoba, Saskatchewan, and Alberta provide that the Lieutenant-Governor in Council, upon proof to his satisfaction that payment of duty within the prescribed statutory period would be unduly onerous, may extend the time for payment to such date and upon such terms as may be deemed proper.

In Manitoba and the Yukon Territory the Minister is empowered to grant the extension upon similar proof being furnished.

The Saskatchewan Act enables the Surrogate Court Judge to make an order extending the time for payment upon the application of any person liable, and on notice to the Attorney-General.

The British Columbia Act provides for extension being granted either by a Judge of the Supreme Court or by the

Lieutenant-Governor in Council. Section 38 provides as follows:—

"38.—(1) A Judge of the Supreme Court may make an order, upon the application of any person liable for the payment of duty, extending the time fixed by law for payment thereof, and also the date when interest shall be chargeable, where it appears to the Judge that payment within the time prescribed by the Act is impossible, owing to some cause over which the person liable has no control, but it shall not be considered or adjudicated as impossible, within the meaning of this section, for a person to make payment of duty merely because of the fact that the Minister or any other person has not made a determination of the duty payable, or has not made or sent to any person any statement thereof.

"(2) The Lieutenant-Governor in Council, upon proof to his satisfaction that payment of the duty within the time limited by this Act would be unduly onerous, may extend the time for the payment thereof to such date and on such terms as to interest or otherwise as may be considered proper."

This provision in the British Columbia Act has been the subject of comment in the following cases, namely:—

*Re Farmer* (1926), 1 D.L.R. 894.

In this case it was held that an extension of time for payment of duty may be granted upon an application made after the expiration of the time fixed for payment.

*Re Oldfield* (1927), 4 D.L.R. 711.

It was held that where succession duties have been finally assessed on an estate in British Columbia the executors have no longer any excuse for non payment of the duties, although they may wish to dispute the assessment, for the statute provides for a refund of over payments, and interest is properly chargeable from the date the final assessment was arrived at.

*Wilson v. Minister of Finance* (1928), 3 D.L.R. 253; 40 B.C.R. 14.

This was an appeal from the judgment of Murphy, J., in so far as it was awarded interest on the duty payable. The judgment was reversed, and it was held that under the Succession Duty Act, 1924, duty is payable on contingent or future estates within two years from the date of death, and interest on such duty cannot be ordered before the expiration of the time limit for payment.

*In re Estate of Helen F. M. Drummond, deceased; Minister of Finance for British Columbia v. Drummond et al.*, 50 B.C.R. 485.

This was an appeal by the Minister of Finance from the order of Murphy, J., made under section 38, whereby he ordered that the time for payment of duty chargeable on the estate of Helen F. M. Drummond, deceased, be extended until 18th May, 1936, and that interest on such duty should not be chargeable if payment was made prior to that date.

It was held that as the petition was launched at the instance of the executors only, and there was no evidence that the beneficiaries under the will be unable to pay the duty, the order extending the time should be restricted to payment by the executors, and should not be extended to include the time for payment by the beneficiaries.

#### Assessment.

If the responsible Minister and the other persons interested do not agree upon the amount of duty payable in any case, or upon any matter bearing upon the determination of such amount, provision has been made by the statutes of Ontario, Nova Scotia, Saskatchewan, and Prince Edward Island, whereby the matter may be referred to the Surrogate Court Judge to have an assessment made. An appeal may be taken by the Minister, or by any one interested, within thirty days from the making and filing of the assessment. No special time for appeal is mentioned in the Nova Scotia Act, but it is provided that the general practice relating to appeals shall govern.

### **Further Information.**

The statutes of Alberta, British Columbia, Manitoba, Saskatchewan, New Brunswick, and Yukon Territory, provide that the Minister may at any time require from any person such information on oath or otherwise as in his opinion is essential to enable him to determine the amount of duty payable.

It is provided in the statutes of Manitoba, Alberta, and the Yukon Territory, that in case the Minister for any reason deems it advisable to examine a person or an officer of a corporation in respect of matters arising out of the administration thereof, a Judge of the District Court or a Judge of the Surrogate Court shall, at the instance of the Minister, order such person or officer to attend before him and submit to examination or oath touching the matters referred to in any affidavit, return or document filed, or touching any property in his knowledge which is or may be dutiable, or touching any debt or encumbrance, or the liability of anyone for the payment of duty, or touching any other matter relating to the administration, and may direct such person or officer to make production upon oath of any books, papers or other writings or documents relating to such matters which are in his possession or under the control of him or the corporation.

### **Refunds.**

The statutes almost uniformly provide that where any debts are proved against the estate of a deceased person, after the payment of legacies or distribution of property from which the duty has been deducted, or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next-of-kin, a proportion of the duty so paid shall be repaid to him by the executor, administrator, or trustee, if such duty has not been paid to the Provincial Treasurer, or by the Provincial Treasurer if it has been so paid.

The Alberta and New Brunswick Acts provide that no such repayment shall be made after the expiration of two years from the death of the deceased.

Section 14 of the Ontario Act provides that the Lieutenant-Governor in Council, upon proof to his satisfaction that an overpayment of duty has been made in any estate, may refund the amount of such overpayment to the person entitled thereto together with interest thereon at a rate not exceeding three per centum from the date of the making of such overpayment to the date on which such amount is refunded; provided no such refund shall be made in any given estate after the expiration of one year from the receipt by the Treasurer of an amount purporting to be in full settlement of the duty or the balance of the duty in such estate.

The question as to how far it is possible to claim a refund of duty paid to the Crown has been considered in the following cases, namely:—

*Royal Trust Company (Executors of Cochrane Estate) v. Attorney-General for Alberta* (No. 2), (1934), 1 W.W.R. 831.

This was a motion to determine certain issues relating to the question of succession duty paid in the estate of William Edward Cochrane, deceased.

The decision upon these issues is stated in the head-note as follows:—

“The executors of an estate are entitled as a matter of right under section 35 of the Alberta Succession Duties Act, 1932, to have the amount of the duty for which the estate is legally liable determined in the manner provided by that section regardless of the state of the payments between them and the Minister. This right is not affected by the fact, if it be a fact, that there is no way of obtaining, without the consent of the Crown, repayment of the sums overpaid.

“Whatever liability by the Crown, if any, may arise as a result of overpayment of duties, it is not a ‘liability under this Act’, within the meaning of section 35. These words

refer only to the liability of the subject to the Crown. Therefore, executors are not entitled in proceedings under the section to a declaration that the Crown is liable to repay any moneys paid it."

In the course of his judgment, Ewing, J., refers to the subject of overpayments to the Crown in the following terms, namely:—

"Whatever liability may arise when the subject overpays the Crown is not, I think, a liability arising under the Act. At most it is a payment of money by the subject under a mistake of law and quite outside the ambit of the Act which contains no provision concerning overpayments or repayment of amounts overpaid."

*Royal Trust Company (Executors of Cochrane Estate) v. Attorney-General for Alberta (No. 3) (1936), 2 W.W.R. 337.*

This was an action for a declaration that the amount paid to the Collector of Succession Duties in respect of the outside property belonged to the plaintiff, and a declaration that The Payments under Invalid Statutes Act was *ultra vires* of the Legislature.

It was held that where money in the possession of the Government is claimed by it as its own, the questions whether it was paid under circumstances which would give rise to a right to recover it back, whether The Payments under Invalid Statutes Act, 1934, is or is not invalid legislation, and whether that Act is couched in apt terms to prevent such recovery back, could be determined only in proceedings by way of petition of right or in some other proceeding at the instance of the Crown.

It was also held that except in cases specially provided for by statute, the only way by which a subject is entitled to obtain back out of the hands of the Crown either land, money or goods, upon which the Crown has, rightfully or



wrongfully, laid its hands, is by a petition of right; and where declarations are sought as foundations upon which to base a claim that the Crown is wrongfully holding money which of right belongs to the plaintiff the Court has no jurisdiction to make such declaration except as incidental to a claim which can only be the subject of a petition of right.

### **Action for Recovery of Duty.**

The statutes provide that succession duty shall be recoverable with costs of suit as a debt due to His Majesty from any person liable therefor by action in a court of competent jurisdiction. An action may be brought notwithstanding the time for payment of the duty has not arrived, subject to the discretion of the Court as to costs. In every such action, the Attorney-General has the same right, either before or after the trial, to require the production of documents, to examine parties or witnesses, or to take such other proceedings in aid of the action as a plaintiff has in an ordinary action.

The statutes of New Brunswick, Saskatchewan, Alberta, and British Columbia, provide that an appeal shall lie in any action for succession duties whenever an appeal would lie if the action were between subject and subject.

### **Summary Applications.**

The statutes of New Brunswick, Manitoba, and Alberta, provide that an action may be brought in or a summary application made to the Court to determine what property is liable to duty, the amount of such duty, the time or times when the same is payable, and the persons liable for the payment thereof. The Court may itself, or through any referee, exercise any of the powers conferred upon any officer or person.

The statutes of Ontario, Nova Scotia and Saskatchewan contain a similar provision giving the Supreme Court or

Court of King's Bench jurisdiction to determine the matters mentioned, without referring to the procedure to be followed.

In British Columbia a Judge of the Supreme Court has jurisdiction in these matters, which may be exercised upon motion or petition.

Provision has been made by the statutes of New Brunswick, Manitoba, and Alberta, whereby a Judge of the Supreme Court or Court of King's Bench has jurisdiction, in an action or on a summary application brought to enforce a lien existing or filed under the statutory provisions, to order a sale of the property. In Saskatchewan an action may also be brought for this purpose.

By section 37 of the British Columbia Act it is provided that a Judge of the Supreme Court may, upon the application of the Minister, issue a summons directing any person liable for the duty to appear and show cause why the duty should not be paid forthwith, or on a day to be fixed by the Judge.

The costs of all proceedings in relation to succession duty are usually declared to be in the discretion of the Court or a Judge. The British Columbia Act provides that the Court may make an order as to the costs in favour of or against the Crown.

To the extent to which a statutory provision waives the prerogative whereby costs may not be given against the Crown, costs may be awarded in proceedings where the Crown has been unsuccessful.

*Attorney-General v. Toronto General Trusts Corporation* (1903), 23 C.L.T. 194; 5 O.L.R. 607; 1 O.W.R. 807; 2 O.W.R. 271.

This was a motion asking for the direction of the Court as to the costs of an action and a special case raising the question as to the liability of the estate of Hugh Ryan, deceased, for succession duty under The Succession Duty Act. Express power was given to the High Court by the Act to deal with costs.

It was held that where the trustees of the estate had paid, or were ready to pay, all the duty which could properly be claimed against the estate, they were entitled against the Crown to the costs of the special case and an action by the Attorney-General to recover higher duties.

Boyd, C., in delivering judgment, said:

"In litigation under the Succession Duties Act which is remitted to the High Court, there is power expressly given to deal with the costs. The Rule of dignity which formerly prevailed that the Crown neither asks nor pays costs, is practically superseded. In petitions of right, costs are in the discretion of the Court. Rule 934. So under the general head of 'Crown actions,' in cases of proceedings before any Court in Ontario by virtue of any statute relating to the public revenue, costs may be dealt with as in actions between subject and subject. Rules 239 and 240."

### **Rules and Regulations.**

The statutes usually contain a provision enabling the Lieutenant-Governor in Council to make rules and regulations for carrying into effect the statutory provisions. These regulations, when made, are published in the provincial Gazette, and are laid before the Legislative Assembly at the session next after the same are made. Regulations have been made under the statutes of Ontario, New Brunswick, and Saskatchewan.

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**SUPPLEMENT**  
TO  
**The Law Relating to**  
**SUCCESSION DUTIES**  
**in Canada**

*Being*  
An Analysis of Recent Changes in the Statute Law  
of the Provinces and Recent Decisions of the  
Courts relating to Succession Duties

BY  
**SAMUEL QUIGG, K.C.**  
Barrister-at-Law  
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Solicitor to the Treasury, Province of Saskatchewan

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## PREFACE

The complete revision of the law in Ontario recently made by The Succession Duty Act, 1939, being Chapter 1 of the Statutes of Ontario, 1939 (Second Session), and the important amendments to the law in other provinces, have rendered it desirable and indeed essential that this supplement to the Second Edition of the author's book on "The Law relating to Succession Duties in Canada" should appear at the present juncture. The revised Ontario statute is framed in such a manner as to bring within the ambit of taxation not only property situated within the province, but also property, the subject-matter of "dispositions" as therein defined. Provision has also been made for the taxation of persons with respect to certain "dispositions" and "transmissions". How far some of these provisions come within the constitutional powers of the provincial legislature is a matter which the Courts may be called upon to consider in the not too distant future. It is particularly noteworthy that the expression "transmission" is now given a statutory meaning, being defined as the passing on the death of any person domiciled in Ontario to any person resident or domiciled in Ontario at the date of the death of the deceased, of any personal property situated outside Ontario at the date of the death.

The Beneficiaries Seizin Act of the Province of Quebec was repealed by Chapter 30, Statutes of 1938. This repeal was the immediate result of the decision of the Honourable Mr. Justice Cannon in *Gary v. The King* (1938), 76 Que S.C. 66, holding that the statutory provisions were *ultra vires* of the provincial legislature. The learned judge held that the subject-matter of taxation under the statute was the entry into possession of foreign property, and that this could not be regarded as constituting taxation within the province. If the "entry into possession" of foreign property cannot be taxed, it would appear to be possible to contend that the same result follows with respect to the "transmission" of such property as defined by the Ontario Act, that expression now meaning the passing of the property on the death. The passing of the property takes place prior to the beneficiary becoming entitled to possession or entering into possession.

Among some of the more recent Court decisions relating to succession duties, the judgment of the Nova Scotia Supreme Court in *Attorney-General for Nova Scotia v. Davis et al.* (1937), 3 D.L.R. 673, should be of particular interest to the provinces. The Court held that a trust fund set up in another province but administrable and distributable under the laws of Nova Scotia must be deemed to have its *situs* in Nova Scotia and there taxable for succession duty purposes. Graham, J., expressed the view that the right of the beneficiaries to call on the trustees to execute the trust was the subject-matter of taxation, and that this right was a chose in action situated in Nova Scotia. Assuming that this opinion is well founded, then the provinces can in effect reach foreign property which is the subject-matter of a trust *inter vivos*, by taxing the beneficiaries, not in respect of the actual property conveyed to the trustees, but in respect of their beneficial interests in the trust fund, even although that fund may consist partly of foreign property or the proceeds thereof. Having regard to the mention



made of the decision in *Sudeley (Lord) v. Attorney-General* (1897), A.C. 11, it seems fair to assume that Graham, J., holds the view that the principle of taxation by reference to the "forum of administration" applies not only to movable property transferred *inter vivos* but is also applicable to the succession to such property under wills and intestacies.

The decisions in the cases of *In re Estate Katherine Dixon, deceased*, 50 B.C.R. 285, and *Re Reading* (1940), O.W.N. 9, add to the large number of cases decided in England and in Canada in which difficulty has arisen as to the incidence of death duties. In the first mentioned case the will of the deceased provided for the executors paying succession and probate duties which might be assessable or chargeable against any gift, devise, bequest or legacy provided for by the will. Robertson, J. held that this direction to the executors was merely a direction to do what it was their duty to do, and did not throw the burden of the taxes upon the residuary beneficiaries. In the second case the will of Wilmot B. Reading contained a direction to his executors to pay all succession duties and inheritance and death taxes that might be payable in connection with any insurance or any gift or benefit given by the deceased to any person either in his lifetime or by survivorship or by his will. It was held that the wide language thus used by the deceased had the effect of freeing all the benefits referred to from succession duty and thus making the duty chargeable to the residue. It is by no means easy to understand this decision, as one would have thought the element of uncertainty in regard to the intentions of the deceased was increased rather than diminished by a general direction to the executors to pay duties, some of which it was their function to pay, and others which ordinarily the beneficiaries were required to pay directly to the Crown or were permitted to pay to the executors in their capacity as revenue officers. It is a matter of difficulty, if not indeed impossible, to harmonize the decision in this case with the views expressed by Simonds, J., in *Re Borough, Public Trustees v. Roberts-Gawen* (1938), 1 All E.R. 375; 82 Sol Jo 174.

A summary of the judgment in the *Reading* case is contained in an article which appears on page 5 of Volume 10 of "Bench and Bar", and the writer of this article appends the following comment:—"In view of the difference of opinion which appears to exist, . . . it is essential that particular care be exercised to see that clear, specific directions are given in wills regarding the payment of succession duty." This is sound advice, and it is suggested that it is only by following it strictly that beneficiaries can be relieved of the burden of paying succession duties.

The author has endeavoured to include in this supplement not only particulars of recent changes in the statute law of the provinces, but also a summary of all the recent Court decisions in relation to succession duties. It is hoped that the supplement will be found of service to members of the legal profession and other persons interested in succession duty taxation.

S. QUINN, K.C.

Regina, Sask.,  
March 1st, 1940.

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# Supplement to The Law Relating to Succession Duties in Canada

## PART I

### RECENT CHANGES IN THE STATUTE LAW

In recent years important changes have been made in the law relating to succession duties by several of the provincial legislatures. The law in Ontario has been completely revised by Chapter 1, Statutes of Ontario, 1939, (Second Session), as amended in 1940, and noteworthy alterations have also been made by other provinces. These changes are embodied in the undermentioned statutes, namely:

Chapter 17, Statutes of Alberta, 1937.

Chapter 70, Statutes of British Columbia, 1937.

Chapter 64, Statutes of Manitoba, 1939.

Chapter 16, Statutes of Nova Scotia, 1938.

Chapter 1, Statutes of Ontario, 1939, (Second Session), as amended in 1940.

Chapter 36, Statutes of Prince Edward Island, 1937.

Chapters 29 and 30, Statutes of Quebec, 1938, and Chapter 20, Statutes of 1939.

Chapter 11, Statutes of Saskatchewan, 1938, as amended in 1940.

The following is a summary of the changes made:

#### ALBERTA

##### Gifts Within Limited Period

Provision has been made for the taxation of gifts *inter vivos* made within ten years of the death of the donor, instead of three years as formerly.

**NOTE:** The British Columbia statute makes provision for the taxation of gifts made within two years of the donor's death. In the provinces of Nova Scotia and Prince Edward Island, the period is three years, and in Quebec, New Brunswick, Manitoba and the Yukon Territory, five years. The Saskatchewan Act formerly made provision for the taxation of gifts made since 21st November, 1903, the date when succession duties were first imposed in the province. This provision was repealed in 1940, and Saskatchewan now taxes gifts made within twenty years of the donor's death. The Ontario Act contains provision for the taxing of dispositions of property (other than realty situate outside Ontario) made within Ontario by any person during his lifetime on or after the 1st day of July, 1892. Provision has also been made by the 1939 Ontario legislation, as amended in 1940, for the taxing of the donee in respect of a disposition of personal property made outside Ontario on or after the 8th day of March, 1937, where the donee is resident in Ontario at the time the disposition is made and at the date of the death of the deceased and the deceased was domiciled in Ontario at the time such disposition is made and at the date of his death. The following classes of gifts are exempt from duty in Ontario, and are also free from aggregation, namely:



(a) Dispositions to the husband, wife, father, mother, or any brother, sister, son, daughter, son-in-law or daughter-in-law of the deceased or any person adopted while under the age of eighteen years by the deceased under The Adoption Act, made more than ten years before the date of death of the deceased, where actual and *bona fide* enjoyment and possession of the property in respect of which the disposition is made, shall have been immediately assumed by the person to whom the disposition is made and thenceforward retained to the entire exclusion of the deceased or of any benefit to him whether voluntarily or by contract or otherwise, provided that this clause shall not apply to any disposition resulting in the making of periodic payments, except such payments as are made more than ten years before the date of death of the deceased.

(b) Dispositions to any person made more than thirty years before the date of death of the deceased, where actual and *bona fide* enjoyment and possession of the property in respect of which the disposition is made, shall have been immediately assumed by the person to whom the disposition is made and thenceforward retained to the entire exclusion of the deceased or of any benefit to him whether voluntarily or by contract or otherwise, provided that this clause shall not apply to any disposition resulting in the making of periodic payments, except such payments as are made more than thirty years before the date of death of the deceased.

#### **Rates of Duty in Alberta**

An additional duty by way of surcharge of 20 per centum of all duties imposed is now levied and added to and collected with the duties so imposed.

#### **BRITISH COLUMBIA**

##### **Aggregation**

The general rule that property exempt from taxation is nevertheless liable to aggregation, and thus in the determination of rates of duty, has been departed from in British Columbia by the provision that in determining "net value", the following shall not be included, namely:

(a) The value of any grant or gift, or devised or bequeathed by any person, for religious, charitable, or educational purposes to be carried out in the province; and

(b) The value of a gift not exceeding \$300

##### **Valuation of Interest in Expectancy**

The rate of interest to be taken for the purpose of determining the value of an interest in expectancy is now four and one-half per centum per annum, instead of six per centum per annum as formerly.

##### **Duty Paid Elsewhere**

No allowance is now made in British Columbia in respect of duty paid elsewhere, subsection (3) of section 3 of the original Act having been repealed.

##### **Exempt Gifts**

Gifts *inter vivos* are exempted from taxation where the property gifted does not exceed \$300 in value.

#### **MANITOBA**

##### **Application of Act**

The provisions of chapter 42, Statutes of Manitoba, 1934, as amended by chapter 64, Statutes of 1939, are applicable in the

case of all persons who have died since the first day of July, 1893, and are deemed to be and declare the law relating to succession duty upon the death of any such person, save

(a) as to any estate upon which the duty has been fully paid and satisfied; or

(b) as to a claim for duty which has been heretofore determined by the judgment of a court having jurisdiction; or

(c) as to an estate upon which the Minister determined no duty was payable, if a full disclosure was made as to all the facts.

The purpose of clause (c), as enacted by chapter 64, Statutes of Manitoba, 1939, is apparently to enable the Minister to claim additional duty where full disclosure of the assets has not been made, whether the failure to make such disclosure is fraudulent or otherwise

#### Rules for Determining Dutiable Value

The rules for determining the dutiable or net value, as set forth in section 7 of chapter 42 of the Statutes of Manitoba, 1934, have been amended by chapter 64 of the Statutes of 1939, and are now as follows:

- “(a) when the deceased is domiciled or resident within the province at the time of his death and the property in the province forms part only of an estate, the other part of which is situate without the province, the allowances shall be deducted from the value of the property in the province, only to the extent of the proportion thereof which the value of the property within the province bears to the value of the whole estate;
- “(b) when personal property is situate without the province and forms only part of an estate, the other part of which is situate within the province, each legacy payable out of the mass of the estate shall be apportioned upon the mass in the same proportion that the value of the personal property in the province bears to the value of the total personal property;
- “(c) when part of the property of the deceased consists of securities of the province which by any statute of the province are exempt from duty, allowances shall be apportioned pro rata between the part of the property which consists of the securities and the balance of the property, and the amount deductible from the balance shall be its proportionate share of the allowances;
- “(d) when part of the property of the deceased consists of securities of the province which by any statute of the province are exempt from duty, every bequest or gift shall be apportioned pro rata between the part of the property which consists of the securities which are not specifically bequeathed or disposed of by gift by the deceased in his lifetime and the balance of the property;
- “(e) when the deceased is domiciled or resident without the province at the time of his death, no allowance shall be made for debts or incumbrances to persons resident without the province, unless contracted to be paid in the province or charged on property therein, except to the extent to which it is shown to the satisfaction of the Minister that the property of the deceased situate outside the province is insufficient for their payment.”

#### Religious, Charitable or Educational Gifts

The Manitoba provision for exemption of religious, charitable, or educational gifts, has been amended, and now reads as follows:

“No duty shall be payable on or in respect of property devised or bequeathed for religious, charitable, or educational purposes, to be carried

out in the province, and not exceeding in value the sum of \$2,000 for any one of such purposes."

### NOVA SCOTIA

#### Interests in Expectancy

An interest in expectancy is, in certain circumstances, to form part of the aggregate and dutiable value respectively. Thus, it is provided by section 4 of the Succession Duty Act of Nova Scotia, as enacted by chapter 16, Statutes of 1938, as follows.

"4.—(a) Whenever by or under any disposition, whether made or taking effect at any time before or after the coming into force of this Chapter, any interest in expectancy in any property falls into possession on the death of any person then the value of such property at the time of such death shall form part of the aggregate value of the property passing on the death of such person, but except as in this section hereinafter provided such property shall not form part of the dutiable value of the property passing on the death of such person.

"(b) If such disposition was other than a testamentary disposition or if such person was at any time competent to dispose of such property or of such interest or if such disposition was a testamentary disposition by any person who died before the 1st day of July, 1932, then such value of such property shall also form part of the dutiable value of the property so passing."

#### Powers of Examination

Special powers of examination in relation to succession duties are now vested in the Attorney-General of Nova Scotia. Thus, by sections 24a, 24b and 24c of the Succession Duty Act, as enacted by chapter 16 of the Statutes of 1938, it is provided as follows:

"24a.—(1) The Attorney-General, or any person or persons to whom as his representative or representatives he may delegate such authority, may at any time or from time to time and notwithstanding the provisions of any other enactment of the Legislature of Nova Scotia make any examination, investigation or inquiry whatsoever into and concerning what, if any, duty is payable under this Act, and for any such purpose the Attorney-General or his representative or representatives as aforesaid shall have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath orally or in writing (or on solemn affirmation if they are entitled to affirm in civil matters), and to produce such documents and things as the Attorney-General or his representative or representatives as aforesaid deem requisite for such examination, investigation or inquiry save that the provisions of rules of Court or of law relating to the service of subpoenas upon and to the payment of conduct money or witness fees to witnesses shall not apply, and save further that no person shall be entitled to claim any privilege whatsoever in respect of any document, record or thing asked for, given or produced on the ground that he might be incriminated or exposed to a penalty or to civil litigation thereby, and no evidence given shall be privileged except under The Witnesses and Evidence Act and The Canada Evidence Act, and save further that no provisions of The Witnesses and Evidence Act shall exempt any bank or any officer or employee thereof from the operation of this section.

"(2) Any person who is summoned by the Attorney-General or a representative or representatives as aforesaid and who, without reasonable excuse, fails to appear or who refuses to make such oath or solemn affirmation or who fails or refuses to give evidence or answer any question, or

any person who, without lawful excuse, fails or refuses to produce anything when so requested, shall be liable to a penalty not exceeding five thousand dollars, or to imprisonment for a period not exceeding two years or to both fine and imprisonment.

"(3) For the purpose of making such examination the Attorney-General, or any person or persons to whom as his representative or representatives he may in writing delegate such authority, shall have the same privileges and immunities as a Commissioner appointed under chapter 13 of the Revised Statutes, 1923, 'The Public Inquiries Act.'

"24b. Every person or corporation, when requested by the Attorney-General, shall within ten days or such longer time as the Attorney-General may allow, produce anything which may be required for the purposes of this chapter. Every person who, without lawful excuse, neglects or refuses to produce anything so requested shall for each such neglect or refusal be liable to a penalty not exceeding one thousand dollars or to imprisonment for a period not exceeding six months or to both fine and imprisonment, and every corporation which, without lawful excuse, neglects or refuses to produce anything so requested shall for each such neglect or refusal be liable to a penalty of not less than five hundred dollars or more than five thousand dollars.

"24c (1) All information and material furnished to or received by the Attorney-General under the provisions of this chapter shall be confidential and no person shall except with the consent in writing of the Attorney-General communicate or allow to be communicated any such information to, or allow access to or inspection of any such material by any person other than the persons liable for the duty or the executor of the estate of a deceased person or the duly authorized solicitor or agent of such person or executor or any other person who may be entitled thereto in the course of his duties when acting on behalf of the Attorney-General.

"(2) Every person who violates any of the provisions of this section shall be guilty of an offence and liable to a penalty not exceeding \$500."

#### **Report of Commissioner**

Where a Commissioner has been appointed to make inquiries, it is provided by section 24 of the Nova Scotia Succession Duty Act, as enacted by section 5, Statutes of 1937, that the report of the Commissioner may be filed in the office of the Prothonotary of the Supreme Court at Halifax. Upon being so filed the Supreme Court of Nova Scotia or a Judge thereof may by order confirm the report or vary or modify the same, and direct that judgment be entered in the Supreme Court of Nova Scotia in accordance with such order.

#### **Affidavit of Value and Relationship**

If any executor or beneficiary does not, within ten days after a demand made by or on behalf of the Attorney-General, make and file an affidavit of value and relationship, such executor or beneficiary is liable to a penalty of not less than \$10 and not more than \$500, and in default of payment to imprisonment for a period not exceeding three months.

Every person who knowingly makes a false statement in the affidavit or in any information required by the Attorney-General is liable to a penalty not exceeding \$10,000 or to imprisonment for a period of six months or to both fine and imprisonment. This is to be in addition to any other penalty to which such person may be liable.

These penalties may be recovered and enforced under the provisions of the Nova Scotia Summary Convictions Act.

### Transfer of Limited Amounts

Moneys on deposit in Nova Scotia to the extent of \$500 may be transferred provided the person or corporation concerned notifies the Attorney-General upon such transfer being made.

### Safety Deposit Boxes

Provisions regarding the opening of safety deposit boxes have been made by chapter 16 of the Statutes of Nova Scotia, 1938, as amended by chapter 20, Statutes of 1939. These provisions are as follows:

"11A.—(1) Unless the consent thereto, in writing, of the Attorney-General or his representative is obtained, no person shall

"(a) open or permit the opening of any safety deposit box or other repository, or remove or permit the removal from Nova Scotia of any safety deposit box or other repository, or withdraw or permit the withdrawal of anything from any safety deposit box or other repository where such safety deposit box or other repository stands in the name of a deceased person either alone or jointly with any other person, or where a deceased person had access or right of access either directly or indirectly to any such safety deposit box or other repository.

"(b) deliver up or part with the possession of any property belonging to a deceased person which is at the time of the death of such deceased person held by him or in his possession for safe-keeping or otherwise.

"(2) Notice in writing of the intention to open any such safety deposit box or other repository or to withdraw anything therefrom or to deliver up or part with the possession or any property held for safe-keeping as aforesaid shall be served on the Attorney-General, or his representative, at least ten days, or other period to which the Attorney-General may agree, before such opening or withdrawal or delivery is intended to take place, and the Attorney-General, or his representative, may attend at the time and place of such opening or withdrawal or delivery, and there give a consent in writing thereto, and he may examine the contents thereof, or the Attorney-General, or his representative, may give such consent without so attending and examining.

"(3) Any person who fails to comply with any of the provisions of this section shall be liable to a penalty not exceeding the amount of duty payable to the Province in respect of any property dealt with in contravention of this section and shall in addition be liable to a penalty of one thousand dollars, but such penalties shall not apply when the Attorney-General is satisfied that the contravention was not wilful.

"(4) No action, suit or other proceeding shall be brought against any person for refusal, pursuant or purporting to be pursuant to this section, to open or permit the opening of any safety deposit box or other repository, or to remove or permit the removal of any such safety deposit box or other repository or any contents thereof "

### Discount for Pre-payment

The provision has been made in Nova Scotia for the allowance of a discount for pre-payment of succession duty before the expiration of the statutory period prescribed for payment. This provision is as follows:

"If any duty is paid before eighteen months have elapsed from the death of the deceased, the Attorney-General may allow to the person liable for the duty discount at a rate not exceeding three per centum per annum upon the amount in respect of which duty is so paid from the date of payment to the expiration of eighteen months from the death

of the deceased. Provided that if any duty is paid after six months but before twelve months have elapsed from the death of the deceased the discount hereinbefore mentioned may be at a rate not exceeding four per centum per annum. And provided further that if any duty is paid before six months have elapsed from the death of the deceased the rate of discount first hereinbefore mentioned may be at a rate not exceeding five per centum per annum "

#### ONTARIO

Numerous and far-reaching amendments to the Succession Duty law of the Province of Ontario were made by The Succession Duty Act, 1939, being chapter 1 of the Statutes of 1939 (Second Session), as further amended in 1940.

#### Direct Taxation

By section 5 of the Act, as amended in 1940, it is provided that, subject to sections 3 and 4, on the death of any person whether he dies domiciled in Ontario or elsewhere,

"(a) where any property situate in Ontario passes on his death, duty shall be levied on such property in accordance with the dutiable value thereof.

"(b) where there is any transmission, duty shall be levied on the person to whom there is such transmission, with respect to such transmission, in accordance with the dutiable value thereof;

"(c) where any disposition, other than of realty situate outside Ontario, is made in Ontario on or after the 1st day of July, 1892, to any person who is resident in Ontario at the date of death of the deceased, duty shall be levied on such person, with respect to such disposition, in accordance with the dutiable value thereof.

"(d) where any disposition of any personal property is made outside Ontario on or after the 8th day of March, 1937, to any person who is resident in Ontario at the time such disposition is made and at the date of death of the deceased and the deceased was domiciled in Ontario at the time such disposition is made and at the date of his death, duty shall be levied on the person to whom such disposition is made, with respect to such disposition, in accordance with the value thereof, provided that this clause shall not apply if, at the date of death of the deceased, the property in respect of which the disposition is made was both situate in Ontario and was owned by the person to whom the disposition is made or by a business or company in which such person was interested directly or indirectly and to which such person has transferred such property without full consideration in money or money's worth."

Section 10 provides that every person resident in Ontario at the date of death of the deceased to whom or for whose benefit any property situate in Ontario passes on the death of the deceased shall be liable for the duty levied on the proportion of such property which so passes to him or for his benefit, together with such interest as may be payable thereon. It is further provided that every person on whom duty is levied shall be liable for such duty, together with such interest as may be payable thereon.

By section 24 it is provided that an executor or trustee, as such, shall not be personally liable for any duty, but an executor, trustee or person in Ontario in whom any property passing on the death of the deceased or any property in respect of which a disposition is made, is at any time after the death of the deceased vested, or who has the management or control thereof, shall not transfer any such property to the person beneficially

entitled thereto without deducting therefrom or collecting an amount sufficient to pay the duty and interest payable by such person.

If an executor, trustee or person transfers any such property without deducting or collecting the duty payable by the person beneficially entitled thereto, he is required to pay to the Provincial Treasurer as a penalty an amount equal to one hundred and fifty per centum of the amount of such duty. There is a proviso that an executor, trustee or person shall not be liable for the penalty if he deducts from the property transferred or collects an amount sufficient to pay the duty and interest payable by the person beneficially entitled thereto as claimed in a statement made pursuant to subsection 1 of section 31 or in any other claim made by the Provincial Treasurer or as determined by any Court.

An executor or trustee or any person who has any money for the payment of duty, interest or penalties is deemed to be a person who has received money for the Crown or for which he is accountable to the Crown within the meaning of The Public Revenue Act.

Although an executor or administrator must file the prescribed succession duty affidavit and inventories before the issue of letters probate or letters of administration, there is no provision in the Act requiring security to be furnished before letters are issued. The only provision regarding security is that contained in section 14 which enables the Provincial Treasurer to accept security satisfactory to him for the payment of the duty. The Provincial Treasurer may allow interest at a rate not exceeding three per centum upon the amount by which any cash security from time to time exceeds the amount of duty which has become payable.

These features of the revised Ontario legislation show clearly that the duties imposed thereby constitute direct taxation. They are imposed on property in the province or on the beneficiaries directly interested, and there is no attempt whatever to make the executor or the administrator of a deceased person personally liable in any manner beyond the imposition of a penalty where property subject to duty is transferred to a beneficiary without the duty having first been deducted therefrom. It cannot be said, therefore, that such executor or administrator is called upon to pay the duties imposed by the Act in the expectation and intention that he shall recoup himself by making a demand upon the beneficiaries.

#### Property

Clause (g) of section 1 of The Succession Duty Act, being chapter 26, Revised Statutes of Ontario, 1937, defines the expression "property" as including money and real and personal property of every description and every estate and interest in such property and income.

There is no definition of the word "property" in The Succession Duty Act, 1939, being chapter 1 of the Statutes of 1939 (Second Session), as amended by The Succession Duty Amendment Act, 1940.

The omission of any definition in the present legislation naturally raises the question as to what the expression "property" is intended to cover. Does it mean the property which the deceased owned at his death, and which then passes, together with the property which is deemed to pass on the death, or is the

expression intended to relate to the beneficial interests in property to which the beneficiaries succeed?

It is clear that the beneficial interests of the successors do not pass on the death of the deceased. What passes is the deceased's own property in bulk, and the properties which are deemed to pass. *Nevill v. Inland Revenue Commissioners* (1924), A.C. 385; 93 L.J.K.B. 321; 130 L.T. 802, 40 T.L.R. 341. In view of the decision in this case, there can be little or no question as to the scope of the legislation. As the legislation taxes "property", and the "transmission of property", the reference must be to the deceased's own property as it exists at the time of death. The language of the statute is accordingly not wide enough to include the taxation of "beneficial interests".

Property is taxed on the assumption that it passes on the death of the deceased in a proportionate manner to or for the benefit of the respective beneficiaries. However, it is doubtful if the property in bulk, as it exists at the time of the death of the deceased, can be said to pass to anyone.

*Sudeley (Lord) v. Attorney-General* (1897), A.C. 11; 66 L.J.Q.B. 21; 75 L.T. 398; 61 J.P. 420; 45 W.R. 305, 13 T.L.R. 38; *Barward's Homes v. Special Income Tax Commissioners* (1921), 2 A.C. 1; 90 L.J.K.B. 545; 125 L.T. 250; 37 T.L.R. 540.

The property in bulk may perhaps be said to pass for "the benefit of" persons in the sense that ultimately when the "beneficial surplus" has been determined each of the beneficiaries are entitled to share in accordance with the provisions of the deceased's will, or the statute governing distribution upon intestacy, or otherwise. The charging sections of the Act make the duty leviable on the proportion of the property passing on the death of the deceased to or for the benefit of the classes of persons mentioned. When it is remembered that in cases of testate succession the value of residuary benefits, or even the very existence of a residue, cannot be ascertained until the estate has been administered, the question presents itself for consideration as to how it is possible to determine as at the date of death the proportion of the testator's property passing to anyone. The onus which rests upon the taxing authority to establish the proportion in each instance may often be difficult to satisfy.

The expression "transmission" is defined as meaning the passing on the death of any person domiciled in Ontario to any person resident or domiciled in Ontario at the date of the death of the deceased, of any personal property situate outside Ontario at the date of such death.

Difficulties may arise in connection with the taxation of transmissions as thus defined, having regard to the following considerations, namely:

(a) Beneficial interests in property do not pass on the death of deceased persons;

(b) The property of deceased persons cannot, as a rule, be said to pass directly to the beneficiaries; and

(c) Taxing statutes must be construed strictly.

See *Nevill v. Inland Revenue Commissioners*, and *Sudeley (Lord) v. Attorney-General*, *supra*.

#### Taxation Within the Province

The Ontario Act, as now framed, makes provision for the taxation of property situate in Ontario, and also for the taxation



of persons resident in the province with respect to transmissions and dispositions of property, as follows

(1) Property situate in the province passing on the death of the owner.

(2) Property situate in the province deemed to pass on the death of any person.

(3) A person resident or domiciled in the province to whom there is a transmission, with respect to such transmission.

(4) A person resident in Ontario at the date of the death of the deceased, with respect to a disposition made to him in Ontario on or after the 1st day of July, 1892, other than a disposition of realty situate outside Ontario

(5) Property in respect of which a disposition is made in Ontario on or after the 1st day of July, 1892, to any person who is not resident in Ontario at the date of the death of the deceased, where such property at the date of the death of the deceased was situate in Ontario and was owned by the person to whom such disposition is made or by a business or company in which such person was interested directly or indirectly and to which such person has transferred such property without full consideration in money or money's worth.

(6) Property in respect of which a disposition is made outside Ontario on or after the 1st day of July, 1892, where such property at the date of the death of the deceased was situate in Ontario and was owned by the person to whom such disposition is made or by a business or company in which such person was interested directly or indirectly and to which such person has transferred such property without full consideration in money or money's worth, and where the deceased was domiciled in Ontario at the time the disposition was made and at the date of his death

(7) A person to whom a disposition of personal property, other than the property mentioned in the preceding paragraphs (5) and (6), is made outside Ontario on or after the 8th day of March, 1937, with respect to such disposition, where such person is resident in Ontario at the time the disposition is made and at the date of the death of the deceased, and the deceased was domiciled in Ontario at the time the disposition is made and at the date of his death. There is a proviso that this paragraph shall not apply if, at the date of death of the deceased, the property in respect of which the disposition is made was both situate in Ontario and was owned by the person to whom the disposition is made or by a business or company in which such person was interested directly or indirectly and to which such person has transferred such property without full consideration in money or money's worth

#### Property Taxation

The properties mentioned in the foregoing classes (1), (2), and (6), were subjected to taxation by the legislation previously in force, so that there is no change in this respect save that in class (6) the ownership of the property is not confined to the person to whom the disposition is made but is now extended to a business or company in which such person was interested directly or indirectly and to which such person has transferred such property without full consideration in money or money's worth.

The property mentioned in class (5), being property situate in the province, is clearly taxable by the provincial legislature, and comes within the category of taxation within the province.

#### Transmissions

Residents in the province are made subject to taxation with respect to transmissions.

The expression "transmission" is defined in clause (s) of section 1 of the 1939 Act as meaning the passing on the death of any person domiciled in Ontario to any person resident or domiciled in Ontario at the date of the death of the deceased, of any personal property situate outside Ontario at the date of such death including such of the personal property mentioned in sub-clauses 1 to 8 of clause (p) as is situate outside Ontario at such date

Clause (p) provides, *inter alia*, that "property passing on the death of the deceased" shall be deemed to include.

- (1) Property held jointly,
- (2) Annuities;
- (3) Insurance on deceased's life or part thereof in proportion to the premiums paid by the deceased,
- (4) Interest of the deceased in a contract of insurance where the moneys are payable on the death of a person other than the deceased;
- (5) Insurance payable to any business or company by which the deceased was employed or with which he was associated or in which he was interested, to the extent of any part of such insurance not paid to or paid to and not thenceforward retained by such business or company for its own use and benefit,
- (6) Interest of a business or company in a contract of insurance which provides for the payment of money as a result of the death of a person other than the deceased, which is paid to any member of the family of the deceased;
- (7) Property of which the deceased was at the time of his death competent to dispose,
- (8) Property passing under settlement,
- (9) Property in respect of which a disposition is made in Ontario on or after the 1st day of July, 1892, to any person who is not resident in Ontario at the date of death of the deceased, which at the date of death of the deceased was situate in Ontario and was owned by the person to whom such disposition is made or by a business or company in which such person was interested directly or indirectly and to which such person has transferred such property without full consideration in money or money's worth;
- (10) Property in respect of which a disposition is made outside Ontario on or after the 1st day of July, 1892, which at the date of death of the deceased was situate in Ontario and was owned by the person to whom such disposition is made or by a business or company in which such person was interested directly or indirectly and to which such person has transferred such property without full consideration in money or money's worth, and where the deceased was domiciled in Ontario at the time the disposition was made and at the date of his death;
- (11) Estates in dower or by the curtesy.

Section 5 of the Act provides that on the death of any person, where there is any transmission, duty shall be levied on the person to whom there is such transmission, in accordance with the dutiable value thereof.

By clause (e) of subsection (1) of section 2 it is provided that the value of a transmission shall be the value at the date of death of the deceased of the property in respect of which there is a transmission.

The taxation of residents with respect to "transmissions", as defined in the present Act, is an entirely novel type of taxation. It differs from the legislation previously in force in the following respects, namely:

(a) The expression "transmission" was not defined in the prior statute law, but is defined in the present Act as meaning "the passing on the death of any person domiciled in Ontario to any person resident or domiciled in Ontario at the date of death of the deceased, of any personal property situate outside Ontario including such of the personal property mentioned in sub-clauses 1 to 8 of clause (p) as is situate outside Ontario at such date."

(b) While the expression "transmission" is not defined in the statute law previously in force there is a provision in that statute (section 6e) declaring that there shall be deemed to be a transmission within the province in circumstances similar to those which must exist under the present Act to fulfil the requirements of the present definition of the word. In other words, what is now defined as a "transmission" was formerly merely deemed to be a "transmission". The legislature has accordingly eliminated any general significance which may attach to the expression apart from statutory definition.

The constitutionality of the provisions imposing taxation upon "transmission", as thus defined, may be considered most conveniently by reference to the classes of death duties previously imposed in Canada and elsewhere. These duties may be classified as follows:

(1) A succession or legacy duty upon or in respect of the succession to beneficial interests in personal property of a domiciled decedent;

(2) A duty or tax upon the transmission of the property of a domiciled decedent to a resident beneficiary, where the property is locally situate outside of the province at the time of death; and

(3) A duty or tax in the nature of a probate or estate duty upon real and personal property locally situate within the taxing province.

It is obvious that the new Ontario tax on residents with respect to "transmissions", as defined by the statute, does not constitute a succession or legacy duty such as that imposed by the English Succession Duty Act, 1853. The expression "succession", as defined in that Act, differs widely from the Ontario definition of "transmission". Indeed, in defining "transmission" the legislature deliberately adopts language similar in terms to that used in the English Finance Act, 1894, which imposes an estate duty. Moreover, it is provided by section 15 that the duty shall be due at the date of death, and by clause (e) of subsection (1) of section 2 that the value of a transmission shall be the value at the date of death of the deceased of the property in respect of which there is a transmission. These provisions show that the duty is payable even before distribution or administration has commenced, that it approximates more closely to an estate or probate duty than to a succession or legacy tax,

and that it cannot be regarded as a tax upon beneficial interests. This conclusion is in no way affected by the fact that the duty is payable by the person who benefits instead of being taken out of the property passing.

It is important to note that the tax upon "transmission", as defined by the Ontario statute, cannot be said to resemble the tax upon "transmission", as that expression is used in the Quebec Succession Duty legislation. The Quebec law has been defined and interpreted in part by the observations of the judiciary. As thus defined, "transmission" under the Quebec law would appear to signify something in the nature of a completed transfer whereby the equitable interests of beneficiaries at the time of the deceased's death are converted into legal ownership by the transfer of such interests. See *Alleyne-Sharple v. Barthe* (1922), 1 A.C. 215; 91 L.J.P.C. 81; 126 L.T. 584; 62 D.L.R. 515; (1922) 1 W.W.R. 100. See also the observations of Mulock, C.J.O., and Hodgins, J.A., in *Attorney-General for Ontario v. Baby* (1927), 1 D.L.R. 1105; 60 O.L.R. 1.

The special definition of "transmission" given in the Ontario Act falls far short of a completed transfer, so that the decisions just referred to can give little assistance in arriving at a conclusion as to the validity of the new tax. This decision has the effect of discarding the ordinary meaning of the word "transmission", as given in Sir James A. H. Murray's Dictionary, as well as the meaning attached to it by the judiciary in relation to the Quebec legislation. In lieu of these meanings the statute adopts the language of the English Finance Act, 1894, and says that "transmission" shall mean the passing on the death of any person domiciled in Ontario to any person resident or domiciled in Ontario of any personal property situate outside of the province at the date of the death, including the special classes of property mentioned in sub-clauses 1 to 8 of clause (p) of section 1 of the Act. The person who benefits by a "transmission", as thus defined, is required to pay the tax.

In *Provincial Treasurer of Alberta v. Kerr* (1933), A.C. 710; 102 L.J.P.C. 137; (1933) 4 D.L.R. 81; Lord Thankerton says:

"Generally speaking, taxation is imposed on persons, the nature and amount of the liability being determined either by individual units, as in the case of a poll tax, or in respect of the taxpayers' interests in property or in respect of transactions or actions of the taxpayers. . . . In considering the limits placed on provincial taxation, the Courts have invariably had regard to the basis or subject-matter in respect of which the taxation is imposed."

What is the basis or subject-matter of the Ontario tax imposed upon residents with respect to transmissions, as defined by the statute? In the course of his judgment in the *Kerr* Case, *supra*, Lord Thankerton proceeds:

"The province is entitled to impose taxation on persons domiciled or resident within the Province in respect of the transmission to them under the provincial law of personal property locally situate outside the province."

In making this statement, however, His Lordship was referring to the "transmission" taxed by the Quebec legislation, and his observations cannot possibly be said to be applicable to the "transmission" as defined by the Ontario Act. This definition shows that the real basis or subject-matter of the tax is "the

passing on the death of a person domiciled in Ontario to a beneficiary so domiciled of personal property situated outside of the province." The expression "passing on the death" is defined in the same manner as it is in the English Finance Act, 1894, which imposes an estate duty, so that the intention of the legislation would appear, at first glance, to impose a similar duty. Comments upon this expression in decisions under the English Act do not support the view that upon property "passing on the death" it is, at one and the same time, regarded as being transmitted to any particular beneficiary or beneficiaries. Indeed, it is difficult to understand how property can be described as passing to any person on the death, save possibly to the executor or administrator of the deceased, the "property" being manifestly the estate in bulk outside of the province and not the beneficial interests to which beneficiaries are ultimately entitled. See *Attorney-General v. Sudeley* (1897), A.C. 11; 66 L.J.Q.B. 21; *Attorney-General for Nova Scotia v. Delamar*, 54 N.S.R. 497, at p. 508. In *Cowley v. Inland Revenue Commissioners*, 68 L.J.Q.B. 435, at p. 441, Lord Macnaghten says

"The principle on which the Finance Act, 1894, was founded is that whenever property changes hands on death the State is entitled to step in and take toll of the property as it passes without regard to its destination"

It may be said that the Ontario Act has regard to its destination, but it is nevertheless difficult to escape the view that in each case the exact subject-matter of taxation is the "property" or the "passing on the death of the property", and not the transmission thereof or succession thereto. This being so, it is doubtful if the "passing on the death" can be regarded as being something which has its  *situs*  in Ontario, the subject-matter of such passing being property situate outside of Ontario. If the taxation of outside property and the "passing on the death of outside property" can be regarded as one and the same thing, then the constitutional validity of the Ontario legislation may be open to question. The following arguments may perhaps be advanced as against this view, namely:

(1) That the real subject of taxation is the person resident in Ontario.

(2) That the intention of the statute is to tax beneficial interests in property, and not the property in bulk held by the deceased at the time of his death.

(3) That the taxation of outside property and the "passing on the death of outside property" are not synonymous subjects of taxation, and that the latter is a subject within the province.

In answer to these contentions it may be said that if the tax were a personal tax, strictly so-called, then it could be rightly argued that it constitutes purely personal taxation and is thus within the province. It is clear, however, that the taxation is not of this nature, as it is imposed upon the person with respect to the passing on the death of outside property. The passing of the property is accordingly the real subject-matter of the tax, and if this is outside of the province, then no argument based upon payment of the tax by a resident can avail.

The suggestion that the legislation taxes beneficial interests is obviously unsound. A beneficial interest cannot pass on death. See *Neuill v. Inland Revenue Commissioners* (1924), A.C. 385; 93 L.J.K.B. 321.

It remains to be considered as to whether or not the taxation of a resident with respect to the "passing on the death of outside property" constitutes taxation within the province. The argument in support of the view that it is within the province would doubtless be based upon an allegation that upon property passing, it does in fact change hands, and that such "passing" is accordingly analogous to a transmission, both the deceased and the beneficiary being within the province. It is felt that this view is fallacious for the following reasons, namely

(1) The property passing on the death is the estate of the deceased in bulk, and not individual interests which reach the beneficiaries upon distribution. This being so, these beneficial interests cannot be taxed on the assumption that they constitute part of the property passing on the death.

(2) Neither the property nor the beneficial interest therein are taxed, but rather the "passing", an entirely new subject of taxation not taxed either under the English or provincial legislation heretofore. The word "passing" is not equivalent to "passed", so that it cannot be said to be equivalent to a completed transmission, having regard to the principle of strict construction of taxing enactments. In *Attorney-General v. Milne*, 83 L.J.K.B. 1083, at p 1088, Lord Dunedin describes the word "passes" as a neutral or vague word, and it is somewhat difficult to understand just what is meant by the taxation of a "passing";

(3) In *Nevill v Inland Revenue Commissioners*, 93 L.J.K.B. 321, at p 325, Viscount Haldane says that the word "passes" may be taken as meaning "changes hands", but his observations merely relate to the passing of property as a whole, without reference to individual interests therein, and, in any event, it cannot be said that the "passing" or "changing hands" can be said to be within the province if the property which thus changes hands is not itself within the province.

(4) If it is contended that there is notional changing of hands or passing of individual interests in the property "passing" on the death, then there is nothing to show how such individual interests are to be valued other than the provision that the value of a transmission shall be the value at the date of death of the property in respect of which there is a transmission, a somewhat ambiguous provision; and

(5) If the Crown claim duty under a taxing statute, it must show that such duty is imposed by clear and unambiguous words. See *Attorney-General v. Milne*, *supra*, per Lord Parker, at p. 1091.

#### Dispositions of Property

The Ontario Act makes provision for the taxation of persons in respect of certain dispositions, and also property, the subject-matter of dispositions, as follows:

(a) A person resident in Ontario at the date of the death of the deceased, with respect to a disposition made to him in Ontario on or after the 1st day of July, 1892, other than a disposition of realty situate outside Ontario.

(b) A person to whom a disposition of personal property is made outside Ontario on or after the 8th day of March, 1937, with respect to such disposition, where such person is resident in Ontario at the time the disposition is made and at the date of the death of the deceased and the deceased was domiciled in Ontario at the time the disposition is made and at the date of

his death. There is a *proviso* that this provision is not to apply if, at the date of the death of the deceased, the property in respect of which the disposition is made was both situate in Ontario and was owned by the person to whom the disposition was made or by a business or company in which such person was interested directly or indirectly and to which such person has transferred such property without full consideration in money or money's worth.

(c) Property in respect of which a disposition is made in Ontario on or after the 1st day of July, 1892, to any person who is not resident in Ontario at the date of the death of the deceased, where such property at the date of the death of the deceased was situate in Ontario and was owned by the person to whom such disposition is made or by a business or company in which such person was interested directly or indirectly and to which such person has transferred such property without full consideration in money or money's worth

(d) Property in respect of which a disposition is made outside Ontario on or after the 1st day of July, 1892, where such property at the date of the death of the deceased was situate in Ontario and was owned by the person to whom such disposition is made or by a business or company in which such person was interested directly or indirectly and to which such person has transferred such property without full consideration in money or money's worth, and where the deceased was domiciled in Ontario at the time the disposition was made and at the date of his death.

Clause (f) of section 1 of the Act defines "dispositions" as meaning:

"(1) any means whereby any property passes or is agreed to be passed, directly or indirectly, from the deceased during his lifetime to any person;

"(2) any means whereby any person is benefited, directly or indirectly, by any act of the deceased during the lifetime of the deceased;

"(3) any allocation, assignment, delivery, dispatching, giving, mailing, payment, release, sending, surrender, transfer, or waiver of or any agreement to allocate, assign, deliver, dispatch, give, mail, pay, release, send, surrender, transfer or waive, during the lifetime of the deceased, any property of any business or company in which the interest of the deceased or his agent or nominee was at the time of such allocation, assignment, delivery, dispatching, giving, mailing, payment, release, sending, surrender, transfer, waiver or agreement, alone or added to that of any member of the family of the deceased, more than fifty per centum, directly or indirectly, of the whole, or any property of any business or company in which the interest of any such first mentioned business or company was more than fifty per centum, directly or indirectly, of the whole;

"(4) any payment during the lifetime of the deceased to any person as a result of the creation of a trust by the deceased, exclusive of the payment of any income derived from any property in which such person had the beneficial interest;

"(5) any payment to or enjoyment by any person during the lifetime of the deceased as a result of any assignment, giving, release, surrender, transfer or waiver of or agreement to assign, give, release, surrender, transfer or waive by the deceased, any right to receive payment of any annuity or income or the right to enjoy any estate or interest for life or term of years; or

"(6) any payment during the lifetime of the deceased to any person as a result of any arrangement effected by the deceased in his lifetime

for any annuity, income or other periodic payment exclusive of the payment of any income derived from any property in which such person had the beneficial interest;

without consideration in money or money's worth or for partial consideration in money or money's worth to the extent by which the value of the property or benefit exceeds the value of such partial consideration, and such means shall include:

- (a) any assignment, delivery, dispatching, giving, mailing, payment, release, sending, surrender, transfer or waiver of any property;
- (b) any agreement to assign, deliver, dispatch, give, mail, pay, release, send, surrender, transfer or waive any property,
- (c) any creation of trust; and
- (d) any contribution of any property of the deceased to a joint tenancy where the deceased is one of the joint tenants, to the extent of the value of the property or part of the property taken or converted during the lifetime of the deceased by any of the other joint tenants for the use or benefit of such other joint tenants or any one of them,

provided that marriage shall not be deemed to constitute consideration for any disposition.

#### Principles Governing Taxation of Dispositions of Outside Property.

Dispositions *inter vivos* of outside personal property may be considered under two headings, namely:

(a) Dispositions made directly to beneficiaries without the intervention of trustees; and

(b) Dispositions by way of creation of trusts.

In so far as the first class of dispositions is concerned, it is felt that, as a rule, such dispositions can only be subjected to taxation in the place where the property is physically located. This is so by reason of the circumstance that the title of the beneficiary is usually based upon the *lex rei sitae*. *Woodruff v. Attorney-General for Ontario*, 78 L.J.P.C. 10; 99 L.T. 750; 24 T.L.R. 912 P.C.

Where the deceased has made a disposition *inter vivos* by way of the creation of trusts and appointment of trustees, then the taxation of beneficial interests under the trust instrument is determined by the forum of administration.

The test of liability to succession duty, formulated by Lord Cranworth, is—whether the beneficiary becomes entitled by virtue of the law of the taxing country.

*Wallace v. Attorney-General* (1865), 1 Ch. App. 1; 35 L.J. Ch. 124; 13 L.T. 480; 14 W.R. 116.

Stirling, L.J., has laid down that Lord Cranworth's test "must be taken to be satisfied, where property is found to be legally vested in a person subject to the jurisdiction of the English Courts, and the title to the beneficial interest in that property is regulated and capable of being enforced by the laws of England, even although the operation of the instrument creating that title may to some extent be governed by foreign law."

*Attorney-General v. Jewish Colonization Association* (1901), 1 K.B. 123; 70 L.J.Q.B. 101; 83 L.T. 561; 65 J.P. 21; 49 W.R. 230; 17 T.L.R. 106, C.A.

In the course of his judgment in this case, Stirling, L.J., considered the question of liability to duty by reference to the following questions, namely:

(1) According to what law was the operative settlement made?



(2) Where was the legal control?

(3) What forum had cognisance of the trusts?

The first two of these questions are really embodied in the third, so that, in the case of dispositions *inter vivos* of movable or personal property the important matter for determination is - what forum had cognisance of the trusts?

In the case of the Jewish Colonization Association, the facts were that Baron de Hirsch, a philanthropist, formed and registered the association as an English company, as a means of effecting his philanthropic purposes. Apart from the original capital which he subscribed, he transferred to the association bearer securities of great value, held partly by English and partly by foreign banks, on the trusts of a settlement, executed abroad but in the English language and form. The Baron was domiciled in Austria and usually resided abroad, but he was described in the deed as of his London address. The trusts were for him for life and then for the benefit of Russian Jews. It was held that succession duty was payable on his death in respect of all the beneficial interests in the securities.

The principle that the forum of administration of the trusts determines the liability for succession duty has been applied in the following cases

*Lyall v. Lyall* (1872), L.R. 15 Eq. 1, 42 L.J. Ch. 195, 27 L.T. 530; 21 W.R. 34.

In this case, a domiciled Australian, on his marriage to an Englishwoman, made a settlement, executed in England, with English trustees, comprising an English policy of insurance, a sum of Consols, and a sum of money which he covenanted to pay. The trusts were for the wife for life, then for the husband for life, then for the issue of the marriage. The wife survived the husband, but died before the trustees had received either the policy money or the sum due under the covenant. It was held that the forum was British and that succession duty was payable in respect of the whole of the settlement funds.

*Re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351; 47 L.J. Ch. 166; 38 L.T. 439; 26 W.R. 257.

An English lady on her marriage with an Italian settled English and foreign securities by a settlement in the English language and form, upon trust for the husband during the joint lives of the spouses, then for the surviving spouse, and then for the children. Three of the four original trustees were English and the other Italian. On the death of the husband, who survived the wife, all the trustees were English, but the beneficiaries were foreigners. It was held that the forum was British and that succession duty was payable on the husband's death.

*Lord Advocate v. Gibson* (1882), 10 Rett. 244; 20 Sc. L.R. 161.

A domiciled Canadian made a settlement in Scottish form with three trustees domiciled in Scotland and one trustee domiciled in Canada. There was power to invest in Canada, but the trust property was in fact invested in Scotland. The settlor retained a life interest, and succession duty was held to be payable on his death.

*Attorney-General v. Felce* (1894), 10 T.L.R. 337; 38 Sol. Jo. 310.

A domiciled Frenchman transferred bearer securities of foreign governments to an Englishman, who, by direction of the transferor, executed a declaration of trust in favour of the transferor.

for life, with remainders over. The trustee died and the funds passed into the hands of his executors, also English. All the beneficiaries were domiciled abroad. It was held that succession duty was payable on the death of the transferor.

The chief factors in determining the appropriate forum of administration of a disposition of movable or personal property are as follows:

- (a) The domicile or residence of the trustees; and
- (b) The legal form of the disposition.

The beneficiaries of a trust have no right to any of the specific assets conveyed by the settlor to the trustee. The only right which they have is a right to call upon the trustee to execute the trust—the right to receive payments from it. That being so, the domicile or residence of the trustee is obviously an important factor in determining the forum of administration.

See *Lord Sudeley v. Attorney-General* (1897), A.C. 11; 66 L.T.Q.B. 21; 75 L.T. 398; 61 J.P. 420; 45 W.R. 305; 13 T.L.R. 38; *Favorke v. Steinkopff* (1922), 1 Ch. 174; and *Shee v. Baker* (1927), 1 K.B. 109.

The legal form of the disposition has a material bearing upon the forum of administration. A person claiming under an instrument which has to be construed by the law of a foreign country is not claiming under the local law. See *Attorney-General v. Jewish Colonization Association*, 70 L.J.Q.B. 101, per Stirling, L.J., at p. 111.

In the case of a disposition *inter vivos*, the domicile of the settlor is usually immaterial. Its effect is exhausted when the property is placed in the legal control of the trustees.

The physical situation of the trust property transferred to the trustees is also unimportant. *Attorney-General v. Jewish Colonization Association*, *supra*, pp. 110, 113, 114, 115.

Where a person making a trust disposition actually seeks the protection of the laws of a particular country for the enforcement of the trusts, that country is justified in imposing a succession duty upon the benefits thereby conferred.

*Attorney-General v. Jewish Colonization Association*, and *Attorney-General v. Felce*, *supra*. See also *Attorney-General of Nova Scotia v. Davis* (1937), 3 D.L.R. 673.

Where benefits are claimed under the will of a deceased person or upon intestacy, the domicile of the deceased is the all important factor in determining the forum of administration of the trusts, and the liability of these benefits to succession duty.

*Thomson v. Advocate-General* (1845), 12 Cl. & Fin. 1; 13 Sim. 153; 9 Jur. 217; *Re Ewin* (1830), 1 Cr. & J. 151; 1 Tyr. 91; 9 L.J.O.S. Ex. 37; 148 E.R. 1371; *Attorney-General v. Napier* (1851), 6 Exch. 217; 20 L.J. Ex. 173; 17 L.J.O.S. 28; 15 Jur. 253; 155 E.R. 520; *Wallace v. Attorney-General* (1865), 1 Ch. App. 1; 35 L.J. Ch. 124; 13 L.T. 480; 14 Jur. N.S. 937; 14 W.R. 116; *Attorney-General v. Campbell* (1872), L.R. 5 H.L. 524; 41 L.J. Ch. 611; *Blackwood v. The Queen* (1882), 8 App. Cas. 82.

It has been contended that these decisions are not applicable to provincial succession duty enactments by reason of the decision of the Judicial Committee in *Provincial Treasurer of Alberta v. Kerr* (1933), A.C. 710; 102 L.J.P.C. 137; 149 L.T. 563; 50 T.L.R. 6; P.C.; (1933) 4 D.L.R. 81.

In that case, however, the Alberta Act under consideration imposed the tax upon property by exclusive reference to its

local situation, so that it was clearly not applicable to trust property situate outside the province. Had the Act imposed taxation in respect of the succession, or the beneficial interests passing to the beneficiaries, Lord Thankerton might easily have reached a different conclusion.

Since the decision in the *Kerr* case was delivered, the Supreme Court of Nova Scotia has applied the test—what forum has cognisance of the trusts?—in relation to the taxation of a trust disposition *inter vivos*. See *Attorney-General of Nova Scotia v. Davis, supra*. Assuming that this decision is well-founded, it would appear logical to conclude that a similar test may validly be applied by the provinces in relation to the taxation of benefits under wills and intestacies.

### Property Subject to Duty

The definition of "property" contained in the prior Ontario legislation has been eliminated from the present Act, and there is now no definition of that expression.

Property passing on the death of the deceased includes.

(1) Property held jointly by the deceased and one or more persons and payable to or passing to the survivor or survivors, except that part of such property which is shown to the satisfaction of the Provincial Treasurer to have been contributed by the survivor or survivors, provided that where the joint tenancy or holding is created by a person other than the deceased and the survivor or survivors, such property shall be deemed to have been contributed to equally by the deceased and the survivor or equally by the deceased and each of the survivors,

(2) any annuity, income or other interest purchased or in any manner provided by the deceased either by himself alone or in concert or by arrangement with any other person to the extent of the interest therein accruing or arising on the death of the deceased;

(3) that portion of the money payable as a result of the death of the deceased under a contract of insurance as is in the same ratio to the whole that the amount of the premiums paid by the deceased on such contract bears to the total amount of the premiums paid;

(4) the interest of the deceased in a contract of insurance which provides for the payment of money as a result of the death of a person other than the deceased;

(5) any money payable as a result of the death of the deceased under a contract of insurance to any business or company by which the deceased was employed or with which he was associated or in which he was interested, to the extent of any part of such money not paid to or paid to and not thenceforward retained by such business or company for its own use and benefit;

(6) that portion of the interest of any business or company mentioned in paragraph (5) in a contract of insurance which provides for the payment of money as a result of the death of a person other than the deceased, which is paid to any member of the family of the deceased;

(7) any property of which the deceased was competent to dispose;

(8) any property comprised in a settlement;

(9) any property in respect of which a disposition is made in Ontario on or after the 1st day of July, 1882, to any person who is not resident in Ontario at the date of the death of the deceased, which at the date of the death of the deceased was situate in Ontario and was owned by the person to whom such disposition is made or by a business or company in which such person was interested directly or indirectly and to which

such person has transferred such property without full consideration in money or money's worth;

(10) any property in respect of which a disposition is made outside Ontario on or after the 1st day of July, 1892, which at the date of death of the deceased was situate in Ontario and was owned by the person to whom such disposition is made or by a business or company in which such person was interested directly or indirectly and to which such person has transferred such property without full consideration in money or money's worth, and where the deceased was domiciled in Ontario at the time the disposition was made and at the date of his death;

(11) any estate in dower or by the curtesy

The expression "property in respect of which a disposition is made" is defined as including any property into which such property has become directly or indirectly converted and any property which, exclusive of income, has been derived from such property.

#### Rates of Duty

The rates of duty under the present Ontario Act remain the same as under the former legislation, except in relation to the surtax. An additional duty by way of surtax on all duties imposed under the Act is levied, the rates being 15 per centum of the duties charged in respect of Class 1 beneficiaries, 20 per centum as applied to Class 2, and 25 per centum as applied to Class 3 beneficiaries.

The rates as determined under the Act are leviable on the proportion of the property passing on the death of the deceased to the classes of beneficiaries mentioned, apparently on the assumption that this proportion is ascertainable as at the date of death.

The rates are determined by the "aggregate value" and certain other factors. The expressions "aggregate value" and "dutiable value" are thus defined:

"Aggregate value" shall mean,—

(1) the value at the date of death of the deceased of the property wherever situate passing on his death; and

(2) the value of all dispositions wherever made where such dispositions are made on or after the 1st day of July, 1892;

less the debts, incumbrances, and other allowances authorized by subsection (5) of section 2 and less the exemptions authorized by section 4.

"Dutiable value" of any property situate in Ontario passing on the death of the deceased, "dutiable value" of a transmission, or "dutiable value" of a disposition made in Ontario, shall mean, respectively, the value of such property at the date of death of the deceased, the value of such transmission, and the value of such disposition, after allowance has been made for the debts, incumbrances and other allowances authorized by and in accordance with subsection (5) of section 2."

Subsection (5) of section 2 provides that in determining aggregate value allowance shall be made for reasonable funeral expenses for the deceased, for debts and incumbrances incurred or created by the deceased *bona fide* and for full consideration in money or money's worth wholly for his own use and benefit, for Surrogate Court fees and for solicitor's fees for obtaining probate or letters of administration to an amount not exceeding \$100, and all debts and incumbrances for which allowance is made shall be deducted from the value of the land or other subject of property liable thereto, but allowance shall not be made,—

- (a) for any debt in respect of which there is a right to reimbursement except such part thereof for which reimbursement cannot be obtained;
- (b) more than once for the same debt or incumbrance charged upon different properties;
- (c) save as aforesaid, for the expense of the administration of the property or the execution of any trust created by the will of the deceased or by any instrument made by him during his lifetime;
- (d) for any debt or incumbrance or any part thereof which by due process of law cannot be realized out of any property;
- (e) for any wages, salaries or other remuneration due by the deceased to any member of his family, except such part of such wages, salaries or other remuneration as the Provincial Treasurer may deem reasonable and proper;
- (f) for any part of any debt not actually and bona fide paid or intended to be paid,
- (g) for any debts for taxes due and payable more than two years prior to the date of death of the deceased, unless such debt is paid or settled within six months after such date, or
- (h) for any debt not recoverable by reason of The Limitations Act or any other statute of limitations.

#### **"Member of the Family"**

The expression "member of the family" is defined as follows

"Member of the family" shall mean,—

- (1) child,
- (2) son-in-law or daughter-in-law of the deceased,
- (3) person adopted under The Adoption Act by the deceased or the spouse or any lawful descendant of such person;
- (4) husband or wife of the deceased,
- (5) father, mother or any brother or sister of the deceased or any lawful descendant of any such brother or sister;
- (6) any brother or sister of the father or mother of the deceased or any lawful descendant of any such brother or sister,
- (7) the father, mother or any brother or sister of the husband or wife of the deceased or any lawful descendant of any such brother or sister; or
- (8) any grandfather or grandmother of the deceased."

#### **Reciprocal Allowance**

Section 7 of the Ontario Act provides that the Lieutenant Governor in Council may provide that where estate, legacy or succession duty is paid in any jurisdiction other than Ontario on property in respect of which there is a transmission, with respect to which duty is levied, an allowance shall be made on account of the payment of such duty, provided that this provision shall apply only to such other jurisdiction as makes a similar allowance with respect to the Province of Ontario.

#### **Value of Listed Securities**

The value of any security which is listed on any stock exchange, or if not so listed, on which a price or quotation is obtainable from financial journals, recognized financial reports or registered brokers, is the closing price or quotation of such security on the day as of which such value is to be determined, or if there is no closing price or quotation on such day, then on the last preceding day on which there is a closing price or quotation.

#### Value of Unlisted Securities

The value of any security which is not listed or on which no price or quotation is obtainable is the value determined by the Provincial Treasurer, and such value shall be deemed to be the value of such security and shall not be subject to review by any Court, notwithstanding anything contained in the Act.

#### Value of Business

The value of any business or of any interest in any business is the value determined by the Provincial Treasurer, and such value shall be deemed to be the value of such business or of such interest in any business and shall not be subject to review by any Court, notwithstanding anything contained in the Act.

NOTE: While the powers thus given to the Provincial Treasurer to determine the value of unlisted securities, and of a business, are very wide, it is thought that such value must nevertheless be determined upon reasonable principles. It cannot have been intended that the Provincial Treasurer should exercise his powers in an arbitrary manner, or that he should determine the value of an unlisted security or of a business entirely without reference to the underlying principles applicable to valuations in general. See *Tinkler v. Wandsworth District Board of Works* (1858), 2 DeG. & J 261; 27 L.J. Ch 342; 22 J.P. 223, 6 W.R. 390

#### Value of Disposition

The value of a disposition is the value at the date of death of the deceased of the property in respect of which such disposition is made, provided that,—

- (a) if such property has been sold for or converted into money during the lifetime of the deceased, the amount of such money is the value of such disposition;
- (b) if the disposition is of money, the amount of such money is the value of such disposition;
- (c) if the disposition is a remission of a debt, the amount of the debt at the date of the remission is the value of such disposition; and
- (d) if the disposition is a disposition of the right to enjoy, the value of such right as at the date of such disposition is the value of such disposition

#### No Allowance for Wages

In valuing any unlisted security on which no price or quotation is obtainable, or any business or any interest in any business, an allowance is not made for wages, salaries or remuneration paid or due to any member of the family of the deceased by any business or company in which the interest of the deceased, or his agent or nominee, was alone or added to that of any member of the family of the deceased, more than fifty per centum, directly or indirectly of the whole, except such part thereof as the Provincial Treasurer may deem reasonable and proper.

#### Variance in Value

Where property is subject to incumbrance at the time a disposition was made and such incumbrance is in existence at the date of death of the deceased; or where there was partial consideration for the disposition; and the value of the property has varied between the time such disposition was made and the date of the death, the value or amount of such incumbrance or the value or amount of such partial consideration is deemed to vary in like proportion.

### Exemptions

There are two classes of exemptions under the present Ontario Act, namely:

(1) Exemptions which are neither included in the aggregate nor the dutiable value; and

(2) Exemptions which are excluded from the dutiable value but are included in the aggregate value.

Exemptions of the first class are as follows:

(a) Dispositions for religious, charitable or educational purposes to any religious, charitable or educational organization which carries on its work solely in Ontario;

(b) Property devised or bequeathed by the deceased for religious, charitable or educational purposes to any religious, charitable or educational organization which carries on its work solely in Ontario, to an amount not exceeding fifty per centum in value of the property passing on the death of the deceased after making the allowances under subsection (5) of section 2;

(c) Dispositions for religious, charitable or educational purposes to any religious, charitable or educational organization which carries on its work both in and outside Ontario to the extent of that portion in value of the property in respect of which the disposition is made as is in the same ratio to the whole that its expenditures for carrying on its work in Ontario bear to its total expenditures during such period as the Provincial Treasurer may determine;

(d) That portion of any property devised or bequeathed by the deceased for religious, charitable or educational purposes to any religious, charitable or educational organization which carries on its work both in and outside Ontario as is in the same ratio to the whole that its expenditures for carrying on its work in Ontario bear to its total expenditures during such period as the Provincial Treasurer may determine to an amount not exceeding fifty per centum in value of the property passing on the death of the deceased after making the allowances under subsection (5) of section 2;

(e) Property devised or bequeathed by the deceased to and any disposition to the Dominion of Canada, the Province of Ontario, or any municipality in Ontario;

(f) Dispositions for necessities or education to or for any member of the family of the deceased where it is shown to the satisfaction of the Provincial Treasurer that such member was dependent in whole or in part on the deceased for such necessities or education;

(g) Dispositions to the father, mother, or any brother, sister, son, daughter, son-in-law or daughter-in-law of the deceased or any person adopted while under the age of eighteen years by the deceased under The Adoption Act, made more than twenty years before the date of death of the deceased, where actual and *bona fide* enjoyment and possession of the property in respect of which the disposition is made, shall have been immediately assumed by the person to whom the disposition is made and thenceforward retained to the entire exclusion of the deceased or of any benefit to him whether voluntarily or by contract or otherwise, provided that this clause shall not apply to any disposition resulting in the making of periodic payments, except such payments as are made more than twenty years before the date of death of the deceased;

(h) Dispositions to any person made more than thirty years before the date of death of the deceased, where actual and *bona fide* enjoyment and possession of the property in respect of which the disposition is made, shall have been immediately assumed by the person to whom the disposition is made and thenceforward retained to the entire exclusion of the deceased or of any benefit to him whether voluntarily or by contract or otherwise, provided that this clause shall not apply to any disposition resulting in the making of periodic payments, except such payments as are made more than thirty years before the date of death of the deceased;

(i) Money paid to or enjoyed by any member of the family of the deceased or after the death of the deceased out of or in respect of any pension fund or scheme of general application to employees by reason of the employment of the deceased by the Dominion of Canada, the Province of Ontario or any municipality in Ontario,

(j) A non-commutable annuity, income or periodic payment effected in any manner other than by will or testamentary instrument and paid for by the deceased during his lifetime, and paid to or enjoyed by the wife or dependent father or mother or any dependent brother, sister or child of the deceased, to the extent of \$1,200 per annum with respect to any one person and to the extent of \$2,400 per annum in the aggregate; and

(k) Property devised or bequeathed by the deceased to and any disposition to The Canadian National Institute for the Blind, The Canadian Red Cross Society or any patriotic organization or institution in Canada which hereafter received the written approval of the Secretary of State of the Dominion of Canada.

The Provincial Treasurer may in his absolute discretion determine whether any purpose or organization is a religious, charitable or educational purpose within the meaning of the Act.

The exemptions which are excluded from the dutiable value but are included in the aggregate value are as follows:

(a) Property situate in Ontario passing on the death of the deceased to any one person where the value of such property does not exceed \$500;

(b) Any person to whom there is a transmission, with respect to such transmission, where the value of all transmissions to such person does not exceed \$500;

(c) Any person to whom a disposition is made, with respect to such disposition, where the value of all dispositions to such person does not exceed \$500;

(d) Property situate in Ontario passing on the death of the deceased to any one person where such property consists wholly of an annuity not exceeding \$100 or of an estate or interest for life or for a term in any property the yearly income from which does not exceed \$100;

(e) Any person to whom there is a transmission, with respect to such transmission, where all the property in respect of which there are transmissions to such person consists wholly of an annuity not exceeding \$100, or of an estate or interest for life or for a term in any property the yearly income from which does not exceed \$100;

(f) Any person to whom a disposition is made, with respect to such disposition, where all the property in respect of which dispositions to such person are made consists wholly of an annuity not exceeding \$100, or of an estate or interest for life or for a



term in any property the yearly income from which does not exceed \$100;

(g) Property situate in Ontario passing on the death of the deceased to a stranger, a stranger to whom there is a transmission and a stranger to whom any disposition is made, where the value of all such property, transmissions and dispositions does not exceed \$1,000, provided such person was in the employ of the deceased for a period of at least five years immediately prior to the death of the deceased; or

(h) Any money payable in Ontario as a result of the death of the deceased under a contract of insurance issued by any insurance company having its head office in Ontario where the policy was situate outside Ontario at the death of the deceased and the deceased was domiciled outside Ontario at the date such contract was made and at the date of his death

There is a proviso with respect to the foregoing exemptions that,—

(1) The total amount in respect of which no duty shall be levied under clauses a, b and c shall not exceed \$500.

(2) The total amount in respect of which no duty shall be levied under clauses d, e and f shall not exceed an annuity or yearly income of \$100; and

(3) Where by reason of clauses d, e and f no duty is levied, clauses a, b and c shall not apply

#### Default in Filing Affidavit of Value and Relationship

In the event of default on the part of any person required to file an affidavit of value and relationship, it is provided that such person shall incur a penalty of \$10 for each day during which the default continues

#### Property not Disclosed

Failure on the part of a beneficiary or of an executor or administrator to make disclosure of property is penalized by section 13 of the Act, which provides as follows:

"13.—(1) Every person in Ontario mentioned in subsections 1 and 2 of section 12 who fails to disclose to the Treasurer any property passing on the death of the deceased or any disposition which such person is required to disclose in accordance with the provisions of section 12, shall pay to the Treasurer as a penalty an amount equal to one hundred per centum of the amount of the duty levied on such property or with respect to the transmission of such property or with respect to such disposition.

(2) Every person in Ontario mentioned in subsections 1 and 2 of section 12 who fails to disclose to the Treasurer any property passing on the death of the deceased or any disposition, which such person is required to disclose in accordance with the provisions of section 12, shall pay to the Treasurer as a penalty the sum of \$1 per day for each full \$1,000 in excess of \$1,000 in value of such property or disposition up to \$10 per day for each day of the period commencing with the day on which an affidavit purporting to be the affidavit required by subsections 1 and 2 of section 12 was filed and ending on the day on which it becomes known to the Treasurer that such property or disposition was not so disclosed, provided that the amount of such penalty shall not exceed the value of such property or disposition."

#### False Statements

Section 35 of the Act provides against the making of false statements as follows:

"No person shall make any false statement in any return, instrument, letter, note, telegram or other document required by, filed with, mailed or furnished to the Treasurer or any officer or employee of the Government of Ontario in connection with any of the provisions of this or of any Act heretofore in force relating to duty, not under oath or affirmation or in a statutory declaration "

Any breach of this provision renders the person in default liable to a penalty of not less than \$1,000 and not exceeding \$10,000 or to imprisonment not exceeding two years, or to both fine and imprisonment.

#### Transfer of Property

The transfer of property subject to duty is prohibited unless the consent of the Provincial Treasurer is obtained. Thus, by section 8 it is provided that on the death of any person, whether he dies domiciled in Ontario or elsewhere, unless the consent of the Treasurer is obtained in writing,—

“(a) No bank, trust company, insurance company or other corporation, having its head office, principal place of business, office from which payments are made, register of transfers, or any place of transfer, in Ontario, shall deliver, assign, transfer or pay, or permit the delivery, assignment, transfer or payment of,—

(1) any property situate in Ontario in which the deceased, at the time of his death, had any beneficial interest; or

(2) any money payable as a result of death under any contract of insurance either effected, contracted for or applied for by the deceased, or in which the deceased had at the time of his death any interest, where the debt resulting in the payment of such money was situate in Ontario at the date of death of the deceased, provided that this subclause shall not apply to any money payable as mentioned in clause h of section 3, and

“(b) No person in Ontario, other than a person acting in the capacity of administering the property passing on the death of the deceased, shall deliver, assign, transfer or pay or permit the delivery, assignment, transfer or payment of any property in which the deceased had at the time of his death any beneficial interest.”

Failure to comply with this provision subjects the corporation or person so failing to a penalty of \$1,000 and an amount not exceeding the amount of duty levied on or with respect to the transmission or disposition of any property dealt with in contravention of the provision.

It is provided that notwithstanding anything contained in section 8, an insurance company may make payment not exceeding \$1,100 due under a policy or policies of insurance without first obtaining the consent in writing of the Provincial Treasurer, and that, where such payment has been made, notice shall be transmitted to the Provincial Treasurer forthwith. If the payment does not exceed \$600, notice is not required.

Provision is made that the consent of the Provincial Treasurer is not required for the payment of one-half of joint moneys to the survivor, or \$500 of such joint moneys (whichever is the lesser amount) provided the banking or other institution concerned notifies the Provincial Treasurer immediately on such payment being made.

It is provided by subsection (2) of section 24 that an executor, trustee or person who transfers any property without deducting or collecting the amount payable by the person beneficially entitled

thereto shall pay to the Provincial Treasurer as a penalty an amount equal to one hundred and fifty per centum of the amount of such duty. There is a proviso that an executor, trustee or person shall not be liable for the penalty if he deducts from the property transferred or collects an amount sufficient to pay the duty and interest payable by the person beneficially entitled thereto as claimed in a statement made pursuant to subsection 1 of section 31 or in any other claim made by the Provincial Treasurer or as determined by any Court.

#### **Safety Deposit Box**

The Act requires that the written consent of the Provincial Treasurer must be given before a safety deposit box can be opened and its contents withdrawn. The penalty for breach of this provision is \$1,000 and an amount not exceeding the amount of duty levied on or with respect to the transmission or disposition of anything withdrawn.

#### **Lien for Succession Duty**

Section 19 provides that where any duty is levied on property passing on the death of the deceased, such duty or so much thereof as remains unpaid, with interest thereon, shall be and remain a first lien and charge on such property until paid or a certificate is given under section 38 discharging such property.

It is further provided that the duty levied on any person to whom a disposition is made with respect to such disposition, shall be and remain a first lien and charge on the property in Ontario at the date of death of the deceased in respect of which the disposition is made where such property is owned at the date of death of the deceased by the person to whom the disposition is made, until paid or a certificate is given under section 38 discharging such property.

The Provincial Treasurer may cause to be registered a caution claiming duty levied on any land, mortgage or charge or on any person to whom any disposition in respect of any land, mortgage or charge is made.

Subject to the provisions of sections 8 and 9 of the Act as to consent of the Provincial Treasurer on transfer of property and the opening of safety deposit boxes, section 56 of The Registry Act, and section 62 of the Land Titles Act, any property passing on the death of the deceased or any property in respect of which a disposition is made which has been acquired by or transferred to any person in good faith for valuable consideration without notice, shall not be subject to any lien or charge for duty or interest.

#### **Certificate of Discharge**

Section 38 provides that when an amount purporting to be in full payment of the duty levied on property situate in Ontario or on any person to whom a disposition of such property is made, with respect to such disposition, has been paid together with any interest on such duty, the Provincial Treasurer shall, upon request, give a certificate discharging such property from any lien or charge for duty and interest.

#### **When Duty Payable**

Unless otherwise provided, the duty is due at the death of the deceased and is payable within six months thereafter. If the duty is paid within six months, no interest is charged, but if not so

paid, interest is charged at the rate of five per centum per annum from the date of death until payment.

#### **Security**

The Provincial Treasurer may accept security satisfactory to him for the payment of the duty. The Treasurer may allow interest at a rate not exceeding 3 per centum per annum upon the amount by which any cash security from time to time exceeds the amount of duty payable.

#### **Interest Allowed for Pre-payment**

Where any duty is paid before the time provided for payment thereof, the Provincial Treasurer may allow interest upon the amount so paid at a rate not exceeding three per centum per annum from the time of payment until the time so provided for payment

#### **Refunds**

Section 22 of the Act provides that the Lieutenant-Governor in Council, upon proof to his satisfaction that an overpayment of duty has been made, may refund the amount of such overpayment together with interest thereon at a rate not exceeding three per centum per annum from the date of the making of such overpayment to the date on which such amount is refunded, provided no such refund shall be made after the expiration of one year from the receipt by the Provincial Treasurer of an amount purporting to be in full settlement of the duty.

#### **Inquiries**

Provisions have been made enabling inquiries to be made either by the Provincial Treasurer, or by a special investigator or commissioner on his behalf, for the purpose of obtaining information to ascertain whether any duty, interest or penalties are or may be due or payable, and if so the amount thereof.

#### **Special Investigator**

The Provincial Treasurer may appoint a special investigator to make such inquiries as the investigator in his absolute discretion may consider necessary. A copy of the appointment of the special investigator may be served on any person at any time. The Provincial Treasurer or special investigator has power to require any person to give him any information and to produce to him any document, record or thing, which he in his absolute discretion may consider necessary for the purpose of obtaining information in order that the Provincial Treasurer may ascertain whether any duty, interest or penalties are or may be due or payable, and if so the amount thereof.

#### **Commissioner**

The Provincial Treasurer may appoint a commissioner to make such inquiries as the commissioner in his absolute discretion may consider necessary. A copy of the appointment of the commissioner may be served on any person at any time.

The commissioner has the same power to administer oaths, summon and enforce the attendance of witnesses and to compel them to give evidence on oath and to produce any document, record and thing as is vested in any court in civil cases, provided that the commissioner is not to be bound by the provisions of rules of court or of law relating to the service of subpoenas on and of payment of conduct money or witness fees to witnesses.

A judge of the Supreme Court of Ontario may on the application of the commissioner, make an order that the evidence of any person shall be taken *de bene esse* or that it shall be taken out of Ontario by commission or otherwise in the like circumstances and with the like effect as a similar order may be made in an action in such court.

Within thirty days after the completion of his inquiries, the commissioner makes a written report to the Provincial Treasurer.

#### **Unrestricted Inquiry Powers**

The powers conferred on the Provincial Treasurer, special investigator, or commissioner are not restricted in any manner either as to person, as to subject-matter of inquiry or otherwise, and such powers may be exercised whether or not any duty has been paid and whether or not any duty, interest and penalties are or may be due or payable at the date of death of the deceased, and no person is excused from giving any evidence, answering any question, furnishing any information or producing any document, record or thing on any investigation or inquiry on the ground of irrelevancy.

Failure on the part of any person to answer any question, furnish any information, or produce any document, as required by the Provincial Treasurer, special investigator, or commissioner, and failure to give evidence on oath as required by the commissioner, renders the person in default liable to a penalty of not less than \$1,000 and not exceeding \$10,000 or to imprisonment for a period not exceeding two years or to both fine and imprisonment.

Privilege cannot be claimed in respect of any information, question, document, record or thing required.

It is provided that no action shall lie against any person who furnishes information or produces documents at the request of the Provincial Treasurer, special investigator, or commissioner.

When requested by the Provincial Treasurer, every person must furnish him with any material which he requires for the purposes of the Act or with written authority to inspect and make copies of any document, record or thing. Failure to do so renders the person in default liable to a penalty of not less than \$1,000 and not exceeding \$10,000 or to imprisonment for a period not exceeding two years or to both fine and imprisonment.

#### **Preservation of Records**

Section 36 of the Act provides that no executor or trustee in Ontario having in his custody any books, records, memoranda, documents or papers relating to any property passing on the death of the deceased or to any disposition, where the aggregate value exceeds \$50,000 shall without the consent in writing of the Provincial Treasurer, destroy, mutilate, deface or alter, or cause or permit the destruction, mutilation, defacement or alteration of, or remove or cause or permit the removal from Ontario of, any such books, records, memoranda, documents or papers. Any breach of this provision renders the person in default liable to a penalty of not less than \$1,000 and not exceeding \$10,000 or to imprisonment for a period not exceeding two years or to both fine and imprisonment.

#### **Destruction of Property**

Section 29 of the Act provides that no person in Ontario after being served with a copy of the appointment of a special

investigator or of a commissioner shall, without the consent in writing of the Provincial Treasurer, destroy, mutilate, deface or alter, or permit the destruction, mutilation, defacement or alteration of, or conceal, or cause or permit the concealment of, or remove, or cause or permit the removal from Ontario of,—

- “(a) any property passing on the death of the deceased, any property deemed by the provisions of any Act in force at the date of death of the deceased to pass on the death, or any property in respect of which a disposition is made, or any muniment or evidence of title to or of interest in any such property,
- “(b) any property, muniment or evidence of title or interest belonging to or in the possession of any executor or trustee relating to any property passing on the death of the deceased, to any property deemed by the provisions of any Act in force at the date of death of the deceased to pass on the death, or to any disposition,
- “(c) any property, muniment or evidence of title or interest, belonging to or in the possession of any person by whom duty may be payable, or
- “(d) any books, records, memoranda, documents or papers relating to anything mentioned in this section ”

Failure to comply with this provision renders the person so failing liable to a penalty of not less than \$1,000 and not exceeding \$10,000 or to imprisonment for a period not exceeding two years or to both fine and imprisonment

#### Stop-Order

Where the Provincial Treasurer in his absolute discretion believes that any property, security, muniment, or evidence of title or interest, safety deposit box or other repository is about to be removed from Ontario or to be dissipated, and is not satisfied that all duty, interest or penalties have been fully paid, he may in writing or by telegram direct any person in Ontario having on deposit, in custody, under control or in safe-keeping in Ontario such property, security, muniment or evidence of title or evidence of title or interest, safety deposit box or other repository, to hold the same until the Provincial Treasurer in writing revokes his direction. The direction may apply to the following:

- (a) Any property, security, muniment or evidence of title to or of interest in any property passing on the death of the deceased, or in any property deemed to pass on the death;
- (b) Any property, security, muniment or evidence of title to or of interest in any property in respect of which a disposition is made; or
- (c) Any safety deposit box or other repository containing any property passing on the death of the deceased, any property deemed to pass on the death, or any property in respect of which a disposition is made, or any property, security, muniment or evidence of title relating to any property passing on the death of the deceased, any property deemed to pass on the death, or any property in respect of which a disposition is made, in the name of, belonging to or in the possession of any executor or trustee, or any safety deposit box or other repository or any property, security, muniment or evidence of title in the name of, belonging to or in the possession of any person by whom duty may be payable.

Failure to comply with the direction of the Provincial Treasurer renders the person so failing liable to a penalty of not

less than \$1,000 and not exceeding \$10,000 or to imprisonment for a period not exceeding two years or to both fine and imprisonment.

The direction of the Provincial Treasurer must be revoked at the end of one year after it has been given unless in the interval he has served a statement as provided by section 31 of the Act or commenced an action under section 34 and has given notice thereof to the person concerned.

#### Statement of Succession Duty

Section 31 of the Act contains the following provisions in regard to statement of succession duty:

(1) The Provincial Treasurer is required to serve the person from whom the duty is claimed with a statement showing the amount of duty, interest and penalties so claimed, and particulars as to the computation thereof.

(2) A copy of such statement must also be served upon the executor or administrator of the estate of the deceased.

(3) The person upon whom claim has been made may within one month after being served with the statement, serve the Provincial Treasurer with a notice of appeal setting out his objection thereto and the reasons therefor and giving an address in Ontario for service.

(4) Within one month after the service of such notice of appeal the Provincial Treasurer must serve the appellant with notice of his decision.

(5) If the appellant is dissatisfied with this decision he must within one month after the service of the notice of decision, serve the Provincial Treasurer with notice of dissatisfaction setting out therein any further facts, statutory provisions and reasons in support of his appeal as he may see fit.

(6) Within two months after the service of such notice of dissatisfaction the Provincial Treasurer is required to serve the appellant with a reply confirming or amending the amount of duty, interest or penalties set out in the statement or in the notice of decision, and he may set out therein the grounds upon which his reply is based.

(7) Within one month after the service of the reply the appellant must pay to the Provincial Treasurer such part as the latter may require of the amount of duty and interest claimed to be payable by the appellant which are claimed to have become payable, and must furnish security, satisfactory to the Provincial Treasurer, for the payment of any such duty which has not become payable.

(8) Within ten days after compliance with the foregoing provision as to the payment and the furnishing of security, the appellant is required to give security for costs in a sum not less than \$200 and not more than \$1,000 to the satisfaction of the Provincial Treasurer, and must also within such period of ten days file with the local registrar of the Supreme Court of Ontario for the county or district in which the deceased resided at the date of his death, or where the deceased died resident outside Ontario, with the registrar of such court, true copies of the following documents:

1. Affidavit of Value and Relationship.
2. Such affidavit of debts as has been filed.
3. Statement of Provincial Treasurer.
4. Notice of Appeal.
5. Notice of Decision.

## 6. Notice of Dissatisfaction.

## 7. Reply.

(9) The documents so filed constitute the record and the proceedings thereupon become a cause in the Supreme Court of Ontario and may be set down or entered for trial by the appellant or by the Provincial Treasurer according to the rules of such court and thereafter proceeded with in the same manner as an action in such court, and the practice and procedure of such court relating to actions to which His Majesty as a party, including any right of appeal, and the practice and procedure relating to appeals, thereafter apply to such cause.

Notwithstanding anything contained in the Supreme Court Rules the Provincial Treasurer or the appellant may at any time before the conclusion of the hearing of the cause amend the documents served by him once without leave.

The cause is to be styled

"In the matter of The Succession Duty Act, 1939, and in the matter of the estate of \_\_\_\_\_ deceased, and in the matter of \_\_\_\_\_ of the \_\_\_\_\_, in the County of \_\_\_\_\_, Appellant."

(10) The judgment or order given in the cause is enforceable as if it were a judgment or order given or made in an ordinary action. If, as a result of such order or judgment, it appears that the appellant has overpaid any amount payable by him, the Lieutenant-Governor in Council, subject to any order as to costs, must refund the amount overpaid together with interest thereon at a rate not exceeding three per centum per annum from the date of the making of such overpayment to the date on which such amount is refunded.

(11) Where the deceased dies domiciled outside Ontario or where the appellant resides outside Ontario, the times limited for the steps to be taken by the appellant are required to be extended by the Provincial Treasurer for such period as may appear to him to be reasonable and proper, and in such case the period of extension must be shown in the statement of duty served.

(12) Service may be effected personally or by mailing by prepaid registered post addressed to the Provincial Treasurer, Parliament Buildings, Toronto, Ontario, and to the appellant addressed to the address set out in his notice of appeal, provided that in the case of the statement of duty service thereof may be effected personally or by mailing the statement by prepaid registered post addressed to the person to be served at his last known address.

#### Warrant

The Provincial Treasurer may issue a warrant for recovery of the duty where the appellant has neglected or refused to comply with the provisions of subsections 3, 5 or 7 of section 31 of the Act. The warrant is directed to the sheriff for the amount, other than penalties, claimed to have become payable, together with interest thereon from the date of the issue of the warrant, and the costs, expenses and poundage of the sheriff. The warrant has the same force and effect as a writ of execution.

Where the appellant has neglected or refused to comply with the provisions of subsection 8 of section 31 of the Act, he is deemed to have admitted all amounts claimed by the Provincial Treasurer, and the amount paid pursuant to subsection 7 is thereupon retained. The Provincial Treasurer may issue a warrant for such



part of the amount, other than penalties, claimed to have become payable, and may realize any security given by the appellant for the balance of the amount claimed. If the appellant has paid all the amount claimed by the Provincial Treasurer, the amount, if any, paid into court as security for costs is paid out to the appellant.

#### **Default by Provincial Treasurer**

If the Provincial Treasurer fails to comply with subsection 4 or 6 of section 31 of the Act, the appellant may, by complying with the remaining provisions of the section, proceed to trial.

#### **Discontinuance by Provincial Treasurer**

The Provincial Treasurer may at any time prior to compliance by the appellant with subsection 7 of section 31 serve on the appellant a notice of discontinuance stating that he withdraws the statement served. Such withdrawal does not limit or affect his right to proceed with or to exercise all or any of the powers, rights and remedies conferred by the Act.

#### **Further Duty**

Notwithstanding any judgment given or order made in any cause under section 31 or in any action under the Act, if it appears to the Provincial Treasurer that any property or disposition is not included in the claim in the proceedings leading to such judgment or order, he may proceed with or exercise all or any of the powers, rights and remedies, including those mentioned in section 31, conferred by the Act for the purpose of collecting any duty levied on such property not so included, or levied on any person to whom there is a transmission of any such property, with respect to such transmission, or levied on any person to whom any disposition not so included is made, with respect to such disposition, together with any interest thereon and any penalties payable by the person to whom such property passes or to whom such disposition is made.

#### **Action for Recovery of Duty**

Section 34 provides that the duty, interest and penalties payable under the Act or any Act in force at the date of death of the deceased may be recovered with costs by His Majesty represented by the Provincial Treasurer by action in any court of competent jurisdiction.

In any action under the Act or in any cause under section 31 any person or any officer or servant of any corporation may be examined for discovery.

The use of any of the remedies provided for by section 34 does not limit or affect the right of the Provincial Treasurer to proceed with or exercise all or any of the powers, rights and remedies conferred by the Act, and any action or proceeding taken under the section does not affect any lien or priority which theretofore existed.

#### **Provincial Treasurer's Powers to Proceed**

The Provincial Treasurer may proceed with or exercise all or any of the powers, rights and remedies conferred by the Act for the purpose of collecting any duty, interest or penalties which should have been paid under the Act or under the provisions of any Act in force at the date of death of the deceased, whether or not,—

(a) any amount purporting to be on account or in full payment of any duty, interest or penalties has been paid, or

(b) any Provincial Treasurer, officer or servant of the Crown has at any time received or acknowledged to have received any amount purporting to be on account or in full payment of any duty, interest or penalties

#### Limitation of Action

Where the material and information furnished to the Provincial Treasurer is full and true in all respects and contains all facts necessary for the purposes of the Act, no claim shall be made against any person for any duty, interest and penalties for which such person is liable after the expiration of six years from the date of payment to the Provincial Treasurer of an amount purporting to be in full settlement of such duty, interest and penalties, or of the balance thereof, provided that nothing contained in this provision shall limit or affect the exercise of any of the powers conferred by sections 25, 26, 30 and 39 of the Act

#### Delegation of Powers

The Provincial Treasurer may delegate his powers to his deputy and the other officials of his Department

#### Penalties

The penalties imposed by the Act are recoverable under The Summary Convictions Act

Notwithstanding the provisions of The Judicature Act and The Fines and Forfeitures Act, the penalties imposed by the Act or by any Act in force at the date of death of the deceased cannot be remitted either in whole or in part, except by the Lieutenant-Governor in Council

The provisions of The Limitations Act do not apply to any action, information or proceeding under the provisions of The Succession Duty Act, 1939, for the recovery of any penalties imposed by the Act or by any Act in force at the date of death of the deceased.

#### Secrecy

Section 42 provides that all information and material furnished under the Act shall be confidential, and that no such information shall be divulged or material permitted to be inspected except by officers of Dominion and provincial governments as may be designated by the Lieutenant-Governor in Council.

#### Application of the Act

The application of The Ontario Succession Duty Act, 1939, is provided for by section 23 of The Succession Duty Amendment Act, 1940, in the following terms, namely:

"(1) This Act shall apply and have effect where the deceased died on or after the 1st day of July, 1932, save that section 40 shall apply and have effect only where the deceased died on or after the coming into force of this Act, and save further that where the deceased died on or after the 1st day of July, 1932, and before the coming into force of this Act, such of the provisions,—

- "(a) levying duty on or making subject to or liable for duty any person, property, transmission or disposition;
- "(b) prescribing rates of duty;
- "(c) allowing exemptions from duty;
- "(d) determining aggregate value;
- "(e) creating an obligation by any person to disclose property passing on the death of the deceased, property deemed to pass on the death and dispositions; and

- "(f) imposing penalties for failure to file returns or for failure to disclose property passing on the death of the deceased, property deemed to pass on the death and dispositions, as are contained in this Act shall not apply but such of the provisions,—
- "(a) levying duty on or making subject to or liable for duty any person, property, transmission or disposition;
- "(b) prescribing rates of duty;
- "(c) allowing exemptions from duty;
- "(d) determining aggregate value;
- "(e) creating an obligation by any person to disclose property passing on the death of the deceased, property deemed to pass on the death and dispositions; and
- "(f) imposing penalties for failure to file returns or for failure to disclose property passing on the death of the deceased, property deemed to pass on the death and dispositions, as are contained in any Act in force at the date of death of the deceased shall apply, notwithstanding the repeal of any of such provisions."

The object of this provision is to keep in force most of the substantive provisions of previous succession duty enactments in relation to the estates of persons dying prior to 22nd September, 1939, when the present Act came into force, and to indicate that the present Act has a retrospective operation only in relation to matters other than the subjects specifically mentioned.

Doubts may arise as to the precise meaning of the provision that "such of the provisions levying duty on or making subject to or liable for duty any . . . transmission . . . as are contained in any Act in force at the date of death of the deceased shall apply, notwithstanding the repeal of any of such provisions."

Does the "transmission" referred to in this provision mean a transmission as defined in clause (s) of section 1 of The Ontario Succession Duty Act, 1939, or does it mean a transmission as understood under previous legislation, whether defined or otherwise?

Applying the principle of interpretation that the same word in the different parts of a statute should be given the same meaning, it would *prima facie* seem to follow that the definition of the expression "transmission" contained in the 1939 legislation should govern.

*Reg. v. Poor Law Commissioners* (1838), 6 A. & E. 56; 7 L.J. M.C. 33; 2 J.P. 22.

*In re National Savings Bank Association, Ltd.* (1866), 1 Ch App. 547; 35 L.J. Ch. 808; 15 L.T. 128; 14 W.R. 1005

*Spencer v. Metropolitan Board of Works* (1852), 22 Ch. D. 142; 52 L.J. Ch. 249; 47 L.T. 459; 31 W.R. 347 (C.A.).

On the other hand, it has been said that if an interpretation clause gives a particular meaning to a word, it does not follow as a matter of course that, if that word is used more than once in the Act, it is on each occasion used with that particular meaning attached, and it may be always a matter for argument whether or not the interpretation clause is to apply to the word as used in the particular clause of the Act which is under consideration.

*Reg. v. Cambridgeshire Justices* (1838), 7 A. & E. 480; 6 L.J. M.C. 6.

*Meux v. Jacobs* (1875), L.R. 7 H.L. 481; 44 L.J. Ch. 481; 32 L.T. 171; 39 J.P. 324; 23 W.R. 526.

These cases are authority for the view that if a defined expression is used in a context which the definition will not fit, it may be interpreted according to its ordinary meaning. But

does the expression "transmission" as defined in the 1939 Act not fit the provision above quoted? In other words, may not the legislature have intended that the definition of "transmission" contained in the present Act shall be applied (if it can be applied) to the law in force prior to 22nd September, 1939, as well as to the law subsequent to that date? That this may well have been the intention is supported by the fact that in section 14 of The Succession Duty Act, being chapter 26 of the Revised Statutes of Ontario, 1937, there is a provision that there shall be deemed to be a transmission within the province where conditions exist similar to those which are now required to meet the terms of the present definition. Moreover, the principle of strict construction of taxing enactments would seem to require that the expression "transmission" as used in the 1939 Act shall apply wherever it is used therein.

Assuming that this conclusion is well founded, it then becomes necessary to inquire as to whether or not there are, in fact, any provisions in the law prior to 22nd September, 1939, subjecting to taxation "transmissions" as now defined. If there are any such provisions, then the prior law is still applicable to that extent, but if not, then transmissions taking place prior to the date mentioned, would appear to be no longer subject to taxation having regard to the repeal provision contained in section 48 of the 1939 Act. The prior law which the legislature has kept in force is the law levying duty upon what are deemed to be "transmissions" pursuant to section 14 of the 1937 legislation. This being so, it is doubtful if any tax can now be levied on transmissions taking place prior to 22nd September, 1939. In *Nevill v. Inland Revenue Commissioners*, 93 L.J.K.B. 321, at p. 324, Viscount Cave says:

"In construing a taxing Act regard must be had not to what one might expect to find in the Act but to the words of the Act themselves."

In *Reg. v. Norfolk County Council*, 60 L.J.Q.B. 379, at p. 380, Cave, J., discussing what is meant by the word "deemed", says:

"Of course that language, it is quite plain, is slightly loose, because, generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing."

### PRINCE EDWARD ISLAND

Recent changes in the statute law of Prince Edward Island affecting succession duties are as follows:

#### Classes of Beneficiaries

By chapter 36, Statutes of 1937, the second class of beneficiaries was extended to include a child or children not dependent on the deceased at the time of his death.

#### Estates in Chancery

By chapter 24, Statutes of 1938, it is provided that in all estates administered in Chancery the same provisions and regulations shall apply thereto as are applicable to the Surrogate and Judge in Probate in relation to succession duties including the power to fix the amount of duty payable and the notification of

the Attorney-General of the closing of all estates on which duties are likely to be paid.

#### **Safety Deposit Box**

By chapter 24, Statutes of 1938, it is provided that the contents of safety deposit boxes, except a last will and testament, are not to be removed unless a report is made to the Provincial Treasurer by the executor or administrator of all documents contained therein and countersigned by the lessor of the box

#### **QUEBEC**

Amendments to the succession duty law of the Province of Quebec were made by chapters 29 and 30 of the Statutes of 1938 and chapter 20 of the Statutes of 1939.

#### **Beneficiaries Seizin Act**

This Act was repealed by chapter 30, Statutes of 1938

#### **Valuation of Securities**

By chapter 29, Statutes of 1938, the value of securities not publicly listed, but freely traded in, is the average price on the day of death. If the securities are not freely traded in, resort is had to balance-sheets and other sources of information to determine the real value. In determining such value, however, the collector has power to reduce or disallow any claim for salary, wages, fees or other remuneration, made by members of the family of the deceased or his heirs, legatees, donees or other beneficiaries, against any company, corporation, partnership, or enterprise in which the deceased was in any way interested to an extent of over fifty per cent. either alone or together with the members of his family, his heirs, legatees, donees or other beneficiaries.

#### **Value of Life Rents**

Life rents and other rents and endowments are capitalized and valued at the amount required, on the date of the death, by a life insurance company, to secure a rent or endowment of a like sum

#### **Value of Receivables**

The real value of claims receivable is the value of the principal and interest owing on the date of the death

#### **Payment in Exempt Securities**

The Provincial Treasurer may require the duty to be paid by the delivery to him of securities which are exempt from taxation.

#### **Safety Deposit Box**

The written consent of the Collector of succession duties is required before the contents of a safety deposit box can be transferred. Upon the opening of the box a minute triplicate must be prepared setting forth its contents. A certified copy of this minute, signed by the administrator and countersigned by the lessor of the box, must be transmitted to the Collector. The minute may be replaced by an inventory, prepared in conformity with articles 1388 and following of the Code of Civil Procedure.

#### **Exemptions**

By chapter 29, Statutes of 1938, it is provided that in case the movable property transmitted, situated outside the province, forms only part of an estate, the other part of which is situated within the province, the exemptions which may be allowed are those contemplated in section 24a of The Quebec Succession Duties Act.

#### **Refunds**

By chapter 20, Statutes of 1939, it is provided that every right to the reimbursement of succession duties paid to the province and every suit to claim back such duties are and always have been prescribed by one year from the date of payment of such duties.

#### **SASKATCHEWAN**

The law in Saskatchewan with respect to succession duties was revised and consolidated by chapter 11, Statutes of 1938. In this revised statute, the following amendments to the prior law were included, namely:

##### **Allowances**

In determining the dutiable value of property or the value of a succession or disposition, no allowance is made for any debt or any part of a debt not actually and *bona fide* paid or intended to be paid.

##### **Forgiveness of Debt**

Section 7 of the Act provides that where, in the lifetime of a mortgagee or vendor, the indebtedness under a land mortgage or an agreement for sale of land has been partially forgiven or has been adjusted on a reduced basis, such partial forgiveness of indebtedness or such adjustment is not deemed to be a gift *inter vivos* provided the Provincial Tax Commission is satisfied that the debt was partially forgiven or the reduction was effected because of the debtor's inability by reason of economic conditions to meet the indebtedness in full, and that the transaction was entered into in good faith and not for the purpose of defeating or evading the payment of succession duty.

##### **Exemptions**

Section 10 provides that the following dispositions and properties shall not be included in the aggregate value or be subject to duty in the circumstances mentioned, namely:

(a) A disposition of any property by the deceased in his lifetime, including the property, the subject-matter of such disposition, and any property devised or bequeathed by him, to or in favour of a religious, charitable or educational organization for religious, charitable, or educational purposes, when such organization carries on its work solely within Saskatchewan.

(b) When a religious, charitable or educational organization carries on its work both within and outside Saskatchewan and there is a disposition of any property by the deceased in his lifetime or any property is devised or bequeathed by him to such organization, the portion of such property which is in the same ratio to the whole as the portion of the expenditures of the organization for carrying on its work in Saskatchewan bears to its total expenditures, during such period as the Provincial Tax Commission determines.

(c) Property which is the subject-matter of a disposition by the deceased in his lifetime or which is devised or bequeathed by him to the Canadian Red Cross Society.

At the 1940 Session of the Saskatchewan Legislature the following additional amendments to the law were made, namely:

##### **Gifts Within Limited Period**

Gifts *inter vivos* made since the twenty-first day of November, 1903, were previously subjected to taxation. This period has now been reduced, and it is provided that the tax shall in future be

confined to gifts made within twenty years prior to the death of the deceased.

#### Statute Barred Debts

In determining dutiable value no allowance is made for any debt not recoverable by reason of the Limitations of Actions Act.

#### Value of Mortgages and Agreements

It is provided that the fair actual value of mortgages and agreements for sale of land shall be deemed to be the full amount of the indebtedness in respect of principal and interest outstanding thereunder as at the time of the death of the owner, provided that:

(a) if the executor within a period of three years from the date of the issue of letters probate or letters of administration establishes to the satisfaction of the Provincial Tax Commission that the personal covenant of the mortgagor or purchaser is valueless and that the estate has suffered a *bona fide* loss as the result of foreclosure or cancellation proceedings or other wise, the commission may in its sole and absolute discretion accept a valuation of such securities based upon the value of the land affected thereby as at the time of the death of the deceased, and may revise the claim for succession duty accordingly;

(b) if the executor within a period of three years from the date of the issue of letters probate or letters of administration establishes to the satisfaction of the commission that he has made and completed a *bona fide* adjustment of the indebtedness and that such reduction was made because of the debtor's inability, by reason of economic conditions, to meet the indebtedness in full and that the transaction was not for the purpose of defeating or evading the payment of succession duty, the commission may in its sole and absolute discretion accept a valuation based upon the adjusted amount of the indebtedness, and may revise the claim for succession duty accordingly;

(c) where a mortgage or agreement for sale of lands has been the subject of a gift by the deceased during his lifetime, the fair actual value shall be deemed to be the full amount of the indebtedness in respect of principal and interest outstanding thereunder as of the date of the gift, provided that the claim for duty may be adjusted as hereinbefore mentioned within a period of three years from the date of the filing of the statement required by subsection (1) of section 33.

#### Judgment Against Beneficiary

It is provided that judgment may be rendered in an action or other proceeding against the beneficiary for the succession duty payable upon property passing to or for his benefit, or in respect of the succession to a beneficial interest in property, and such judgment may be executed not only against such property or beneficial interest, but also against any property owned by the beneficiary within the province

#### Assessment of Succession Duty

After examination of the statement filed, and the report of the appraiser appointed pursuant to section 38, if any, the Provincial Tax Commission is required to make an assessment determining the amount of succession duty payable and the person or persons liable for payment of the duty or any part thereof. Notice of the assessment is thereafter given by mail to the executor, or his solicitor, and to the other person or

persons by whom the duty or any part thereof is claimed to be payable.

#### **Appeal Procedure**

The executor, or any person interested, who objects to the assessment, or claims that he is not liable to taxation either in whole or in part, may personally or by his agent, within thirty days after the date on which the notice of assessment is mailed, serve a notice of appeal upon the Board of Revenue Commissioners. The notice is served upon the Board by mailing the same by registered post. On the hearing of the appeal, the Board may affirm or amend the assessment appealed against.

An appeal from the decision of the Board and any further appeal is subject to and governed by the provisions of The Treasury Department Act, 1938. This Act provides for appeal being taken to a Judge of the Court of King's Bench on questions of law, and for a further appeal to the Court of Appeal. No appeal lies from the decision of the Court of Appeal except where the constitutional validity of The Succession Duty Act is involved.

#### **When Duty Payable**

The duty upon property or dispositions of property is payable at the death of the deceased. The duty in respect of the succession, unless otherwise provided, is payable at the time when the successor, or any person in his right or on his behalf, becomes entitled in possession to his succession or to the receipt of the income and profits thereof. If the duty is not paid within twelve months from the death, interest is chargeable thereon as from the date of death at the rate of six per centum per annum.



# Supplement to The Law Relating to Succession Duties in Canada

## PART II

### RECENT COURT DECISIONS RELATING TO SUCCESSION DUTIES

#### Bequests Free from Duty

*In re Estate Katherine Dixon*, deceased, 50 B.C.R. 285; (1936) 1 D.L.R. 593; (1935) 3 W.W.R. 118; (1936) 1 W.W.R. 383.

Katherine Dixon died on 10th September, 1934, and her executors applied by petition to the Supreme Court of British Columbia for the opinion of the Court as to whether or not her devises and bequests were to be free of probate and succession duties. The will contained the following clause.

"I direct my executors to pay from and out of my estate as soon as may be convenient, all my just debts, funeral and testamentary expenses as well as succession and probate duties (if any) which may be assessable or chargeable against any gift, devise, bequest, or legacy herein provided for."

Thereafter following a number of bequests and devises appeared this clause

"Subject to the bequests of this my will heretofore made, I direct my trustees to divide all the rest and residue of my estate together with any devises or bequests that may lapse, equally among the Salvation Army and the Crippled Children's Hospital Home, both of the City of Vancouver"

Evidence was given by two of the legatees that it was the deceased's intention that the legacies should be paid free of "death duties" Robertson, J., held that this evidence was not admissible, since it did not fall within the equivocation rule

It was further held, following the decision *In re Kennedy; Corbould v. Kennedy* (1917), 1 Ch 9; 86 L.J. Ch 40; that the succession duties were payable out of the bequests and devises, and that, by virtue of section 6 of the Probate Duty Act, 1934, probate duties were in the same position

#### Situs of Bearer Bonds and Bank Deposits

*The King v Sanner et al., and Bank of Montreal*, 74 Que. S.C. 42.

This was an action by the Province of Quebec for recovery of succession duties amounting to \$65,308.52, from the executors of William A. Clark, junior, deceased, who had died domiciled in Montana, United States of America. The duties were claimed in respect of certain bearer bonds and moneys deposited in the Bank of Montreal, City of Montreal.

The defendants contended that the Quebec Succession Duties Act imposed taxes on persons and not on property, and that the Act was *ultra vires* as to persons domiciled outside the province.

It was further contended that the bonds and moneys deposited in the Bank of Montreal were not taxed by the Act. The Quebec Superior Court ruled against these contentions.

It was held that the Act imposed a tax upon property and not upon persons, and it was accordingly within the competence of the Legislature to impose it upon persons or the estates of persons domiciled outside of the province.

It was further held that the bearer bonds deposited in the Bank of Montreal were movable property and had a *situs* at the place where they were physically located at the time of the death of the deceased; they were negotiable instruments and specialties.

The bank balance was situate at the office of the bank in Montreal, and was subject to duty, for the reason that a debt is located at the place where it is payable because there the assets to satisfy it are presumably to be found. The Court, without proof could take judicial notice of the location of the bank's head office.

In the course of its judgment, the Court commented upon the constitutionality of section 13 of the Quebec Act in the following terms:

"The Court has not overlooked the plaintiff's argument that the terms of section 13 of the present Quebec Act are so broad that it may in certain respects be *ultra vires* and, therefore, illegal, because by making the testamentary executors, trustees and administrators responsible, in their said quality, for the amount of the tax and making the judgment against them executory, not only on the property taxed (that which is situated here and, therefore the only property within its jurisdiction) but also on any other property wherever situated, which falls under the control of such trustees, testamentary executors and administrators, but on which the Province has no right to impose such tax, on account of its being situate outside the Province. Whether what this section purports to do exceeds the Province's power is of no importance in the present case. Should the plaintiff, having obtained judgment in the present case, attempt to execute the same against property situate outside the Province, the defendants would then be entitled to set forth their present contention and have the Courts decide whether the attempted execution is or is not *ultra vires*. Therefore, the question need not be decided, nor is there any reason for its being so in the present case, and what has just been said about the testamentary executors, trustees and administrators applies equally to the argument based on the responsibility of the heirs and legatees referred to in the first paragraph of this section 13."

#### Transfer of Insurance

*Perron v. Mutual Life and Citizens Assurance Company, Ltd.* (1936), 40 Q.P.R. 128.

The beneficiary under a life insurance policy sued the defendant insurance company thereon. An heir of the deceased intervened. The beneficiary made an inscription in law against the intervention, which was maintained as the intervenant had not alleged that the succession duties had been paid and had not demanded the annulment of the policy.

#### Situs of Bonds in Transit.

*Re Moore* (1937), O.W.N. 304; (1937) 2 D.L.R. 746.

Mary G. Moore, deceased, was at the time of her death domiciled and resident in Grafton in the State of North Dakota, and died there at or about the hour of 6.20 in the afternoon,

Eastern Standard Time, on 3rd July, 1936. At the time of her death she was the owner of certain registered or coupon registered bonds of the Dominion of Canada and of the Province of Ontario which had been by her deposited and left with the Canadian Bank of Commerce at Lindsay, Ontario, for safekeeping and subject to her order and directions. By letter received by the bank at Lindsay on 27th June, 1936, the deceased gave instructions for the bonds to be forwarded to the Grafton National Bank at Grafton, North Dakota. Pursuant to this request, the Canadian Bank of Commerce enclosed the bonds in an envelope addressed to the Grafton National Bank, and mailed same by registered mail at Lindsay post office on 3rd July, 1936, between the hours of 5.40 and 6 o'clock in the afternoon, Eastern Standard Time, and therefore before 6.20 o'clock, the moment of the death of the deceased.

At the moment of the death of the deceased the bonds were in the custody of the Lindsay post office. They were in the regular course of post delivered to and received by the Grafton National Bank, Grafton, North Dakota.

Counsel for the executrix of the deceased contended that the bonds were found and first became capable of being found in North Dakota, being property in transit, citing in support of this contention *Herron v. Keeran* (1877), 59 Ind. 472, to the effect that bonds in transit out of a state or having a situs elsewhere, are not taxable. Reference was also made to *Attorney-General v. Pratt* (1874), L.R. 9 Ex. 140.

The Court rejected this contention and held that the bonds were, on the death of the deceased, situate within the Province of Ontario, and it was immaterial for purposes of taxation, whether or not any control could have been exercised over the bonds, by way of seizure or otherwise, while in the possession of the post office.

Note: While the decision rendered in this case may be technically correct, it is somewhat difficult to understand how the judgment of the Court in such circumstances could be executed, the property being outside of the Province after the death of the deceased. The laws of one country are not taken notice of in another country, and it is on this principle that judgments proceeding on such laws are not recognizable. *Attorney-General for Canada v. Schulze* (1901), 9 Sc. L.T. 4; *Planche v. Fletcher*, 1 Douglas 251.

#### Valuation of Property

*In re Leiser; Forman and Fowkes v. Minister of Finance*, 51 B.C.R. 368; (1937) 2 D.L.R. 341; (1937) 2 W.W.R. 428.

The executors of the estate of Max Leiser, deceased, filed affidavits of value of six parcels of land. Five of the parcels were of small value but the sixth, upon which was situate the Cecil Hotel in Victoria, British Columbia, was valued at \$32,800. The provincial assessor claimed all the properties were undervalued, and fixed the value of the Cecil Hotel property at \$33,800. On petition by the executors under section 40 of the British Columbia Succession Duty Act, the executors claimed they were mistaken in fixing the value of the Cecil Hotel property at \$32,800, which was its assessed value, as they found on further inquiry that the hotel building of four stories had no elevator and the heating system was not efficient, and submitted that the

"fair market value" was far less than the assessed value of the property.

It was held by Robertson, J., that the value given by the executors with relation to the five parcels should be accepted as the "fair market value" at the time of the deceased's death, but the value of the Cecil Hotel property should be reduced to \$15,000.

On appeal, it was held, on an equal division of the Court, that there was evidence upon which Robertson, J., could find as he did and his decision should be affirmed. It was further held that in valuing hotel property for succession duty purposes, depreciation of the property due to economic conditions and loss of liquor trade upon enactment of the Liquor Control Act so that it is no longer operated profitably as a hotel business are to be considered in determining its fair market value. McPhillips and McQuarrie, J.J.A., having so found, the appeal of the Minister of Finance was dismissed.

Macdonald, C.J.B.C., and Martin, J.A., were of opinion that the hotel property had been under-valued and should be increased.

Martin, J.A., says (51 B.C.R. 373).

"For practical purposes in attempting this 'difficult thing to measure' there is, to my mind, really very little substantial difference, if any, in applying to present conditions the varying expressions that we find in different statutes, such as, for example, 'cash value', 'actual cash value', 'actual value', 'fair actual value', 'fair market value', etc., etc., because since it must be conceded . . . that the value is not to be ascertained by a forced sale the only other way under present conditions by which a sale can be effected is by negotiation with a prospective purchaser, and such a sale must therefore inevitably be the foundation of the 'measure' of the 'fair market value' that the statute in question contemplates, despite the fact that, as Chief Justice Duff aptly says, 'it frequently happens that there is no standard of measurement which can enable us to arrive at anything like accuracy in the result.' . . . It comes, to my mind, to this that under present circumstances and conditions at least the controlling word is 'value', and if this be not the correct view, then no value at all can be fixed under the expression 'fair market value' where, as herein, there is no 'market' in the ordinary commercial sense for real property, and the disastrous result will be that no duty at all can be collected, and the reasonable intention of the true meaning of the statute would be frustrated. But no one would take such an extreme position, and it has not been taken here; on the contrary, the appellant invited this Court, and below, to determine the value despite the absence of a market."

#### Forum of Administration of Personal Property

*Attorney-General of Nova Scotia v. Davis, et al.* (1937), 3 D.L.R. 673.

The Province of Nova Scotia claimed succession duty on gifts of promissory notes made by the Hon. J. Robson Douglas, deceased, to his four daughters in his lifetime. Both he and his daughters were domiciled outside of Nova Scotia at his death.

Douglas Rogers, Ltd. was incorporated in Nova Scotia in 1923. Through it the deceased conducted financial transactions. On two occasions the company gave the deceased its note for the amount to his credit. Afterwards, in September, 1931, he had the company give him four demand notes in favour of his daughters, as follows: To Marion I. Davis a note for \$206,611.30,

and to each of the others one for \$206,610. These notes were found, after his death, in a "strong box" which he kept in the vault of Douglas Rogers, Ltd., at Amherst, Nova Scotia. It was held, on the evidence, that deceased made a gift to his daughters by taking the notes in their names. The debts represented by the notes were situated in Nova Scotia because that was where the debts could be enforced and because the notes were there at deceased's death. Under the Nova Scotia Succession Duty Act, 1923, as amended, succession duty was payable on these gifts. The 1936 amendment was expressed to be retrospective and applied even though the action for succession duties was pending when the amendment was passed.

In addition to this gift the deceased set up three trusts for the benefit of his daughters in the years 1923 and 1924,—the first in the Montreal Trust Company, with head office in Montreal, and the second and third in the Eastern Trust Company, a Nova Scotia corporation. The scheme of all three trusts was the same. In a general way they provided for annual payments to each daughter as she reached 21, to be continued until the youngest was 55, when, subject to lapses by death and otherwise, the fund was to be distributed to them. The defendants contended that the trust fund administered by the Montreal Trust Company stood in a different position from those in the Eastern Trust Company because its head office was at Montreal and the trust was set up there. This contention was rejected because by a term in the trust agreement it was provided that

"All matters and things respecting the creation, execution and enforcement of the trusts by this deed created shall be deemed to be such as are wholly to be performed within the Province of Nova Scotia, and shall be altogether within the jurisdiction of the Supreme Court of Nova Scotia."

It was held that the deceased made the trust funds clearly and definitely a Nova Scotian chose in action, and that these funds were accordingly liable to succession duty.

In the course of his judgment, Graham, J., says:

"A trust fund is a chose in action, and the right to receive payments from it is a chose in action. Douglas made it clearly and definitely a Nova Scotian chose in action; and, paraphrasing the words of Bray, J., in *Attorney-General v Johnson* (1907), 2 K.B. 825, 'it became property in Nova Scotia because he wished it should be so. He stipulated that the Nova Scotian Court was to be the forum to enforce it'.

"It is not suggested that either the Province or Douglas could change the law regulating the situs of property; but Douglas could stipulate that the trust be administered here. The fact is that he might thereby subject the gift to duty in two Provinces. It comes therefore directly within the class of property which becomes subject to duty here because it must be brought here to be administered or distributed. This is where the claimants must come to establish their claim. It is immaterial that at the date of death the property is outside the province, if it has to be distributed here. *Lovitt v. The King* (1910), 43 S.C.R. 106, at p. 142. The right to claim payment and distribution of such property is constructively within the Province because it is a chose in action which has to be demanded from the Trust Company here. *Lovitt v. The King*, at p. 144. I think also that under this trust agreement it is actually here . . .

"The next inquiry is—What did the beneficiaries take, and was it taxable? It is the result of the gift and not its form that determines what

it is. The situs of most of the securities held by the companies under the trust agreements is admittedly outside of Nova Scotia. Was it the actual securities held by the companies, or a right to receive payments under the agreements that the beneficiaries took? . . . It could not have been the securities. It must have been the right to call on the Company to execute the trust—the right to receive payments from it, which was given and taken. That right is a chose in action: *Favorke v. Steinkopf* (1922), 1 Ch. 174. See also *Shee v. Baker* (1927), 1 K.B. 169, at pp. 121 and 128-9. That being so, the situs of the right of property taken by the beneficiaries is, for reasons already set out, in Nova Scotia, and so taxable here under section 7 of the Act.

"I refer also, in disposing of the questions raised as to the effect of the trust agreements, to High Court of Australia v. Perpetual Trustee (1926), 34 Com. L.R. 12, *Re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351; *Lord Sudely v. Attorney-General* (1897), A.C. 11; *Attorney-General v. Jewish Colonization Association* (1901), 1 Q.B. 123; *Re Smyth, Leach & Leach* (1898), 1 Ch. 89, *Attorney-General v. Johnson* (1907), 2 K.B. 885.

"The appellants are the persons to whom the right of property passed. It is property within the language of the Act, and by section 10(1) each of them being a 'person to or for whose benefit the property passed,' is liable to pay the duty upon so much of it as passed to her."

Graham, J., held that duty was not payable on so much of the trust funds as were paid prior to the death of the deceased. Thus, at p. 685, he says

"The property to be liable to taxation must, at the date of Douglas' death, be in Nova Scotia (or be property which has to be brought here to be administered). The Statute does not attempt to alter the situs of property. It only assumes, in operating its scheme of taxation, that the passing of property which it clearly can tax, takes place at death instead of at the actual time. Presuming that these payments were made under trust agreements which are being administered in Nova Scotia, they were administered as far as these payments are concerned, and the money of the payments was removed out of Nova Scotia before his death. The right to recover them no longer existed. Neither the payments nor the right to receive them remained at his death in Nova Scotia: *Adamson v. Attorney-General* (1933), A.C. 237. This being so, the situs of the property is outside Nova Scotia, and it is not taxable."

Hall, J., dissents from the views thus expressed that the payments made in the lifetime of the deceased are not taxable, and says

"The right to receive these payments is identical in nature and origin and arose as a result of the same transactions as the subsequent rights under those trusts, and they are dutiable on the same principle."

**Note:** The decision of the Nova Scotia Supreme Court in this case throws considerable light upon the question as to how far provincial legislatures may subject to taxation the beneficial interests of *cestui que trustent* in trust property notwithstanding that the property may be physically situate outside of the taxing province at the time of the death of the deceased donor.

The decision would appear, at first glance, to be contrary to the judgment of the Privy Council in *Provincial Treasurer of Alberta v. Kerr* (1933), A.C. 710; 102 L.J.P.C. 137; (1933) 4 D.L.R. 81. In that case, however, the subject-matter of taxation was not property brought to the province to be administered or distributed, but rather the personal property of the deceased situate outside the province and passing on his death. The *Kerr*

case is also distinguishable in that under the Alberta Act an attempt was made to directly reach the outside property of the deceased, whereas under the Nova Scotia Act, as interpreted by the Supreme Court, the subject-matter of taxation is the right of property possessed by the beneficiaries, that is to say, the beneficial interests in the outside property.

Assuming that the views of the Nova Scotia Supreme Court are well founded, the following important constitutional results appear to follow from its decision, namely:

(a) The forum of administration determines the place where the beneficial interests in movable or personal property disposed of *inter vivos* can be subjected to taxation:

(b) In view of the reference in the judgment of Graham, J., to the decision in *Lord Sudeley v. Attorney-General* (1897), A.C. 11, the provinces may impose taxation in respect of the disposition or devolution of outside movable or personal property under wills and intestacies, the subject-matter of taxation being the beneficial interests of the beneficiaries and not the trust property itself;

(c) The test of liability to a succession duty, in the strict sense of that expression, is—whether the beneficiary becomes entitled by virtue of provincial law

#### Dispositions of Movable Property *Inter Vivos*

In support of his conclusion that the forum of administration of trust funds determines the location of the beneficial interests in such funds, Graham, J., refers to a number of English decisions, including *Attorney-General v. Jewish Colonization Association* (1901), 1 K.B. 123; 70 L.J.Q.B. 101; 83 L.T. 561; 65 J.P. 21; 49 W.R. 230; 17 T.L.R. 106, C.A. In that case, Baron de Hirsch, a philanthropist, formed and registered the Jewish Colonization Association as an English company, as a means of effecting his philanthropic purposes. Apart from the original capital which he subscribed, he transferred to the Association bearer securities of great value, held partly by English and partly by foreign banks, on the trusts of a settlement, executed abroad but in the English language and form. The Baron was domiciled in Austria and usually resided abroad, but he was described in the deed as of his London address. The trusts were for him for life and then for the benefit of Russian Jews. It was held that succession duty was payable in England on his death in respect of the whole of the securities.

The Court arrived at the conclusion that England was the forum which had cognizance of the trusts, and it was on this ground that duty was held to be payable. Reference was made to the test of liability formulated by Lord Cranworth in *Wallace v. Attorney-General* (1865), 1 Ch. App. 1; 35 L.J. Ch. 628; whether the beneficiary becomes entitled by virtue of the law of the taxing state. Stirling, L.J., said that this test "must be taken to be satisfied, where property is found to be legally vested in a person subject to the jurisdiction of the English Courts, and the title to the beneficial interest in that property is regulated and capable of being enforced by the laws of England, even although the operation of the instrument creating that title may to some extent be governed by foreign law."

See also *Lord Advocate v. Gibson*, 20 Sc. L.R. 161; (1882) 10 R. (Ct. of Sess.) 224; *Attorney-General v. Felce* (1894), 10 T.L.R.

337; *Re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351; 47 L.J. Ch. 166; 38 L.T. 439; 26 W.R. 257.

#### Movable Property Under Wills and Intestacies

The judgment of Graham, J., proceeds on the basis that beneficiaries are taxable at the place where their right exists to call upon the *cestui que trustent* to execute the trust. He evidently considers that this principle is applicable alike to dispositions *inter vivos*, and to dispositions and devolutions under wills and intestacies, having regard to the reference made to the decision in *Lord Sudeley v. Attorney-General* (1897), A.C. 11; 66 L.T.Q.B. 21; 75 L.T. 398; 61 J.P. 420; 45 W.R. 305; 13 T.L.R. 38. In that case, a testatrix was a beneficiary under the will of her husband, a domiciled Englishman, to the extent of one-fourth share of the residue of his estate. That estate included sums invested on mortgages of real estate in New Zealand. Before the residue had been distributed or the mortgage securities paid off the testatrix died, bequeathing her personal estate to her executors on trust for sale and conversion. The executors in proving her will included as part of her estate a fourth share of the residue of her husband's estate, but claimed to leave out of account the share of the New Zealand mortgages. It was held that as the only right which the testatrix's executors had in respect to the New Zealand mortgages was to call upon the husband's executors to get in his outstanding personal estate, such rights was an asset of the testatrix's estate, whose locality was English, and therefore her executors were liable to pay probate duty in respect of such English asset.

It is clear from this decision that the beneficial interest of a beneficiary under a will or upon intestacy is not a right to any specific asset of the testator or intestate but merely a right to call upon the domiciled executor or administrator to execute the trust. This right is a chose in action existing in the place where the deceased was domiciled, and is taxable there, notwithstanding that the assets of the deceased are situate elsewhere.

The ultimate test of liability to succession duty is accordingly—whether the will and legacy, or the intestacy and residue, are a will and legacy, or an intestacy and residue, regulated by the laws of the taxing state. This principle would appear to be applicable in a Canadian province, just as it is in England, notwithstanding the limited character of provincial powers of taxation. Moreover, if the "beneficial interest" is the subject-matter of taxation, the tax can be said to be "within the province" irrespective of where the beneficiaries are resident. This is not so if the foreign property of a domiciled decedent is taxed directly.

The distinction between property of the deceased and beneficial interests in property as subject-matters of taxation has frequently been referred to in cases relating to the English legacy and succession duties and analogous taxation. Quotations from the following decisions are given by way of illustration:

*Pipon v. Pipon* (1744), Amb. 25; 9 Mod. Rep. 431; 27 E.R. 14, 507:

The Lord Chancellor: "To enable a person to sue for any part of the personal estate, he must qualify himself from that which is the proper jurisdiction of the place where the personal estate lies; but that does not determine the right to the equitable



property, or to that property which is considered in equity, or in the canon or ecclesiastical law, in distributing the shares of that personal estate."

*In re Ewin* (1830), 1 Cr. & J. 151; 1 Tyr. 91; 9 L.J.O.S. Ex. 37; 148 E.R. 1371.

Bayley, B.: "It is clear that the rule is that personal property follows the person, and it is not, in any respect, to be regulated by the *situs*; and if in any instance, the *situs* has been adopted as the rule by which the property is to be governed, and the *lex loci rei sitae* resorted to, it has been improperly done. Wherever the domicile of the proprietor is, there the property is to be considered as situate."

*Re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351; 47 L.J. Ch. 166; 38 L.T. 439; 26 W.R. 257.

Jessel, M.R.: "In one sense, no doubt, it is foreign property, because it consists of sums due from the French Government or the Bank of France, and must be transferred according to the provisions of French law. But it is movable property, and is subject to the general rule that dispositions of movable property are governed by the law of the domicile of the person to whom the property belongs. If so, the ownership being that of an English lady, who transferred it to English trustees, and afterwards dealt with her beneficial ownership by an instrument executed according to the forms required by English law, how can it be said that the property is not English?"

*Harding v Commissioners of Stamps for Queensland* (1898), A.C. 769; 67 L.J.P.C. 144.

Lord Hobhouse: "As regards locality, it is clear that the assets now in question have locality in Queensland; but that does not affect the beneficial interest to which succession duty is attached, and which devolves according to the owner's domicile."

#### Test of Liability to Succession Duty

The test of liability to succession duty, as formulated by Lord Cranworth, is—whether the person sought to be taxed claims title by virtue of the law of the taxing state.

*Wallace v. Attorney-General* (1865), 1 Ch. App. 1, 35 L.J. Ch. 124; 13 L.T. 480; 14 Jur. N.S. 937, 14 W.R. 116.

In this case, the deceased had been domiciled in France during his lifetime, and, by his will, had disposed of a sum of English Consols. Lord Cranworth, in giving judgment, held that the provisions of the English Succession Duty Act, 1853, must be given some limitation and that they must be confined "to persons who become entitled by virtue of the laws of this country."

As a general rule the forum for administering the trusts of a will is the Court of the country where the testator was domiciled. This appears to be the logical result of the decision in *Lord Sudeley v. Attorney-General*, *supra*. The will of a domiciled decedent may, however, create a trust to be administered outside of the country of domicile. In such circumstances, succession duty is payable in the country where the trust is administered.

*Attorney-General v. Campbell* (1872), L.R. 5 H.L. 524; 41 L.J. Ch. 611.

In this case, a testator, who died domiciled in Portugal, made a will in English form, appointing three executors resident in England and a fourth resident in Portugal. Most of the testator's estate was in Portugal, but he directed his executors to invest

the residue in the English funds. A sum of consols was to be set apart to provide life annuities for the testator's wife and sister. Subject to this the residue was to be held in trust for the testator's children. The trustees appropriated a certain sum in consols to provide for the widow's annuity. On her death, it was held that the increase of benefit accruing to the residuary legatees was receivable from a trust fund administered in England and that this benefit was accordingly liable to succession duty.

Lord Westbury said:

"If a man dies domiciled abroad, possessed of personal property, the question of whether he has died testate or intestate, and also all questions relating to the distribution and administration of his personal estate belong to the Judge of the domicile, and that on the principle of *mobilia sequuntur personam* He sets up the forum of administration. Now apply that to the present case. The legatees would resort to that forum to receive their legacies, and the residuary legatees, when the residue has been ascertained, would resort to that forum to receive it. When they have received it, the legacy is discharged, and all things that are incidental to the legacy cease. They receive it, bound with the duty of bringing it to this country and investing it here in consols, which they are directed to hold upon certain trusts mentioned by the will. But the character of the ownership is no longer that of a legacy. The character of the ownership is, under the trusts, directed to be created by the will. There is, therefore, a settlement made of the property which is brought into this country, and invested here in such mode of investment as gives to the property whilst it remains here the character of English property in respect of locality."

The foregoing statement of Lord Westbury does not mean that "administration", in the wide sense as including collection of estate assets, is governed by the law of the domicile. This distinction is referred to by Sir Arthur Hobhouse in *Blackwood v. The Queen* (1882), 8 App. Cas. 82, at p. 92, as follows:

"The statement that personal estate is governed by the law of its owner's domicile must be taken with material qualifications . . . For the purpose of succession and enjoyment the law of the domicile governs the foreign personal assets. For the purpose of legal representation, of collection and of administration, as distinguished from distribution among the successors, they are governed, not by the law of the owner's domicile, but by the law of their own locality."

That it is proper to apply the principle *mobilia sequuntur personam* in the construction of a provincial enactment imposing a succession duty, as distinct from an estate duty, appears to follow from the decisions in *Harding v. Commissioners of Stamps for Queensland* (1898), A.C. 769; 67 L.J.P.C. 144; *Lambe v. Manuel* (1903), A.C. 68; 72 L.J.P.C. 17; and *Rex v. Lovatt, Canadian Reports* (1912), 1 App. Cas. 15; 81 L.J.P.C. 140. In the last mentioned case Lord Robson says, at p. 94:

"The principle or practice thus defined is considered just and expedient as between nations, and our Courts give it full effect in the construction of taxing statutes both English and Colonial."

See also the observations of Duff, C.J.C., in *Cotton v. The King*, 1 D.L.R. 398, at pp. 419, *et seq.* The principle is founded upon "domicile", and it is noteworthy that although Canada is a single unit of the British Empire, nevertheless each province is a country in the legal sense of that term, and a man is

domiciled not in Canada, but in one of the provinces of Canada. See *Attorney-General for Alberta v. Cook* (1926), A.C. 444; 95 L.J.P.C. 102; 134 L.T. 717; 42 T.L.R. 317.

In the course of his judgment in *Wallace v. Attorney-General*, *supra*, Lord Cranworth said.

"Parliament has, no doubt, the power of taxing the succession to foreigners to their personal property in this country. But I can hardly think we ought to presume such an intention, unless it is clearly stated."

In making this statement, His Lordship must have had in mind a "succession" as that expression is defined in the English Succession Duty Act, 1853, namely, a disposition or devolution taking effect under the law of the domicile. While England may have the power of imposing such taxation, the provincial legislatures have no such power, being limited to direct taxation within the province. See *Lambe v. Manuel* (1903), A.C. 68; 72 L.J.P.C. 17.

The decision in *Toronto General Trusts Corporation v. The King* (1919), A.C. 679, 88 L.J.P.C. 115; 46 D.L.R. 318; (1919) 2 W.W.R. 354; appears to furnish authority to the contrary. In that case, however, the subject-matter of taxation was "property situate within the province" and not the "succession", and the duty was really part of the price paid in relation to local administration. The title to the property referred to in the judgment is the title by reference to its local situation, as distinguished from the title to "beneficial interests", the subject-matter of a true succession duty, which is regulated by the domicile. See *Lord Sudeley v. Attorney-General*, *supra*.

#### *Fund for Payment of Succession Duty*

*Re Boyd* (1937), O.W.N. 589; (1937) 4 D.L.R. 791.

By the will of John Boyd, who died on December 27, 1932, his estate was devised in trust to transfer all household goods to his widow, Mary H. Boyd, and the residue of the estate was to be converted into money to pay debts and testamentary expenses and certain pecuniary legacies. The will then directed that the executors pay all succession duties upon all legacies and gifts including income given by subsequent clauses of the will. The residue of the estate was to be invested and the income paid to the widow for life or until her re-marriage, and thereafter the corpus was devised in various pecuniary legacies.

In the year 1918 Mary H. Boyd made a gift *inter vivos* to her husband, John Boyd, of certain capital stock of the Boyd Brumell Company, and the proceeds of this stock formed a large part of the estate of John Boyd.

A question having arisen as to what property should bear the succession duty on the gift made by Mary H. Boyd, it was held that the duty was payable out of the property, the subject-matter of the gift, that is, out of the estate of the late John Boyd, part of which estate was made up of this gift. It was further held that the duty was payable proportionately out of the share or interest of each of the legatees under the will of John Boyd as were not exempted from payment of duty by the will itself.

#### *Strict Construction of Taxing Statutes*

*Armstrong v. Estate Duty Commissioners* (1937), A.C. 885; (1937) 2 W.W.R. 593; (1937) 3 All E.R. 484; 106 L.J.P.C. 133; 187 L.T. 376.

Sir C. P. Chater died on 27th May, 1926, and by his will bequeathed an annuity of £10,000 to his wife for her life. Estate duty was paid on the whole of his estate when probate was granted in 1926, and on the death of Lady Chater on 11th March, 1935, a further duty was charged under section 5(1) of the Hong Kong Estate Duty Ordinance, 1932, by reason of the cesser of the annuity previously paid to her. Section 5(1) of the Ordinance, provided that property passing on the death should be deemed to include property in which the deceased had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest.

The trustees of the will of Sir C. P. Chater resisted the claim for further duty, relying upon section 25 of the Ordinance which provided that if estate duty had been paid in respect of any settled property upon the death of one of the parties to a marriage, no estate duty should be payable on the death of the other party to the marriage, unless such person was at the time of his or her death or had been at any time during the continuance of the settlement competent to dispose of such property. By subsection (2) of section 25 it was provided that

"(2) For the purposes of this section, the term settlement means any deed, will, agreement for a settlement or other instrument, or any number of instruments, whether made before or after or partly before and partly after the commencement of this Ordinance, under or by virtue of which instrument or instruments any property, or any estate or interest in any property, stands for the time being limited to or in trust for any persons by way of succession, and the term settled property means the property comprised in a settlement."

The Estate Duty Commissioner contended that there was no settled property within the meaning of section 25 of the Ordinance.

By his will, Sir C. P. Chater directed that his trustees should be at liberty, if they thought fit, to set apart out of the residuary estate investments representing such a capital fund as should at the time of appropriation, be sufficient to produce annual sums to pay the annuity. After appropriation, these annual sums were to be wholly charged on the investments so appropriated in exoneration of the rest of the estate. No fund was set aside by the trustees to meet the annuity to the widow, which was in fact paid out of general income of the estate, as and when the annuity became due.

It was held by the Judicial Committee that the appellants were bound to pay the duty claimed, and that the exemption provided for by section 25(1) of the Ordinance did not apply. The phrase, in section 25, "any property or any estate or interest in any property", read, with the words "stands limited", referred to definite property or an estate or interest in it which actually existed and could be precisely defined. It could not be said that a hypothetical "slice" of the property passing by the will could be treated as an interest in that property within the meaning of section 25 of the Ordinance.

Per Lord Maugham (1937), 3 All E.R. 484, at p. 489:

"Was there, under the will of the testator, any property, or any estate, or any interest in any property, which, before the death of Lady Chater, stood limited to or in trust for the residuary legatees by way of succession? It is clearly not enough to show that there was a species of charge upon the property of the testator for the benefit of Lady Chater.

It must be shown that substantially the whole of certain property, or of the estate, or interest in it, was held upon trust, in effect, for Lady Chater during her life, and, so far as benefit was concerned, passed to the residuary legatees upon her death . . . The whole of the income of the estate was not applied in making the annual payments to Lady Chater. Nor can their Lordships hold that a hypothetical slice of the property passing by the will can properly be treated as an interest in that property within the meaning of section 25(2) . . . It should, perhaps, be added that, for the purpose of an exemption, such as that given by section 25(1), the actual facts must be looked at, and that it is impossible to hold that exemption should be granted merely because events which have not taken place might well have taken place, since they were clearly within the powers of the trustees."

*Note:* The decision in this case affords further illustration of the principle that taxing enactments must be strictly construed, and that where the Crown has established *prima facie* a claim for a duty or tax, the onus of showing that an exemption applies rests upon the taxpayer.

Moreover, it goes to show that it is not possible to establish that any particular item or items of property owned by a decedent passes or is transmitted to any particular beneficiary or beneficiaries, where the subject-matter of taxation is the deceased's property in bulk as it exists at the time of death or the transmission of that property. No one beneficiary can be said to be entitled to a hypothetical "slice" of the decedent's property, as such, so as to render such "slice" liable to taxation. See *Lord Sudeley v. Attorney-General* (1897), A.C. 11; 66 L.J.Q.B. 21, 75 L.T. 398; 61 P.C. 420, 45 W.R. 305; 13 T.L.R. 38, H.L.; *Attorney-General for Nova Scotia v. De Lamar et al.*, 61 D.L.R. 251, 54 N.S.R. 497, *In re Bennett Estate; Provincial Treasurer of Manitoba v. Bennett* (1936), 1 W.W.R. 691, 44 Man. R. 63; (1936) 2 D.L.R. 291; *Barnardo's Homes v. Income Tax Special Commissioners* (1921), A.C. 1; 90 L.J.K.B. 545; 125 L.T. 250; 37 T.L.R. 540.

#### Petition to Continue Suit

*Desrochers and Laramee v. Desrochers*, 63 Que. K.B. 352.

In this case, Dame Malvina Desrochers was defendant in an action claiming the sum of \$267.20, the amount of a promissory note. She died before the hearing of the case, leaving a will by the terms of which she instituted her husband and her minor children universal legatees. It was held that the husband personally and in his quality of tutor might present a petition for leave to continue the case on behalf of the estate without alleging that the succession duties in connection with the estate had been paid or in the alternative, that none were exigible. It was further held that the terms of the Quebec Succession Duties Act did not preclude the heir or beneficiary who resides in the province from establishing judicially, and as a preliminary step, his quality as such.

#### Situs of Shares

*Toronto General Trusts Corporation v. The King* (1937), 75 Que. S.C. 449; (1938) 1 D.L.R. 40.

The assets of Albert William Austin, deceased, included 687 shares of the capital stock of Consolidated Mining and Smelting Company, whose head office is in Montreal. The deceased was domiciled in Ontario. The shares in question were registered in Montreal, although the share certificates were found in Toronto, Ontario, at the time of the death.

The Province of Quebec claimed succession duty on the shares on the ground that their registration in Montreal determined the *situs* as being in Quebec, and the amount claimed was paid under protest.

The company had established an office for the transfer of shares in Toronto, Ontario, and, in these circumstances, it was held that registration did not fix the *situs* of the rights which the shares conferred, as, by virtue of section 4 of the Dominion Companies Act, Revised Statutes of Canada 1927, chapter 27, their transfer and registration might validly have been effected either in Montreal or in Toronto. The fact that the deceased was domiciled in Toronto, and that the share certificates were found in Toronto, showed that the real situation of the shares was in the Province of Ontario, and not in Quebec. The claim made by the company for reimbursement of the succession duty paid on the shares was accordingly sustained.

It was held, however, that dividends on the shares were debts owing by the debtor company domiciled in Montreal, and hence succession duty was properly payable on these dividends.

#### Payment of Duties Before Action

*Clouthier v Clouthier and Metropolitan Life Insurance Company*, 76 Que. S.C. 59

In this case it was held that an heir who takes an action in partition against his co-heirs must allege that he has paid the succession duties or that none are exigible. In default of compliance with the Quebec Succession Duties Act, an heir has no right to claim any part of the estate of the deceased, and his action, if he does not allege such compliance, will be dismissed.

#### Quebec Beneficiaries Seizin Act

*Gary v The King* (1938), 76 Que S.C. 66.

Mattie Gary was the sole and universal heir of Henry P. Buell, deceased, who died domiciled in the City of Montreal, Quebec, on 14th July, 1934. At the time of his death and thereafter she was domiciled at Richmond, Virginia, United States of America. The estate of the deceased consisted partly of property situated in Quebec, and partly of property situated elsewhere. Under the provisions of the Quebec Beneficiaries Seizin Act, the province claimed the sum of \$25,552.37 as the tax payable in respect of the putting the heir into possession of the movable property of the deceased situated outside of Quebec. The amount claimed was paid under protest, and in this action reimbursement of the amount so paid was sought. Cannon, J., gave judgment against the province and ordered the amount paid to be reimbursed. He held that the Quebec Beneficiaries Seizin Act was *ultra vires* of the legislature. Notwithstanding that the Act was so framed as to require merely the payment of Court fees for an order placing a beneficiary in possession of assets, it was in its pith and substance a taxing statute. The tax was imposed in effect on property situate outside the province, and passing to beneficiaries domiciled outside. Accordingly, though direct and designed to raise a revenue for provincial purposes, it was not imposed within the province, and hence did not comply with the British North America Act.

In the course of his judgment, Cannon, J., says:

"The province cannot impose a tax on persons domiciled or ordinarily resident outside of its territory, nor on property actually situated outside of Quebec.

"In the matter of a succession, the legislature can:

- (a) Tax all the property situated in the province;
- (b) Tax the transmission, in the province of Quebec, resulting from a succession arising in the province and devolving to a beneficiary domiciled or ordinarily resident in the province.

"The law concerning *seizin* goes beyond these powers. It taxes the putting into possession of an heir domiciled and ordinarily resident outside of the province, where the property of a domiciled deceased comprises property situated both within and without the province, and it suspends the *seizin* in relation to all property provided for by article 607 of the Civil Code, until such time as the putting into possession has been ordered by the Court.

"This tax is really imposed on the putting into possession not of the property of the succession as a whole, but only of the portion of the property situated outside of the province, and it is required to be paid by a beneficiary who is neither domiciled nor resident within the territorial limits of the province.

"In effect, the property actually situated in Quebec, when the succession arises, is taxed under chapter 29 of the Statutes of 1925, and amendments thereto, and the result of the payment of the tax is the transmission both of the property and the possession.

"The beneficiary has already paid \$121,640.96 in taxes. The legislature surely did not have the intention of imposing double taxation upon the property devolving upon her. She is domiciled and resident in Virginia, one of the United States of America, and thus escapes the territorial jurisdiction of the province.

"The property of the succession actually situated outside the province is not of itself subject to the provincial power of taxation. The transmission of the property and possession thereof, being situated outside of Quebec, have no location in the province, for the reason that the beneficiary is not domiciled nor resident in the province.

"The entry into possession of movable property, actually situated outside of the province, by a person domiciled and resident in Virginia, cannot, either in fact or in law, have any location in the province of Quebec."

Note: In this case, Cannon, J., bases his decision upon the following considerations, namely:

(a) That the subject-matter of taxation under the Quebec Act is property actually situated outside of the province, or the entry into possession of such property by a non-resident, which entry could not take place within the province. The Act was accordingly *ultra vires*, as coming within the category of legislation held invalid in *Provincial Treasurer of Alberta v. Kerr* (1933), A.C. 710; 102 L.J.P.C. 137; 149 L.T. 563; 50 T.L.R. 6, P.C.; (1933) 4 D.L.R. 81; (1933) 3 W.W.R. 38;

(b) That the statute does not impose taxation in respect of the transmission of outside property such as was held to be valid in relation to a resident sole or universal beneficiary in *Alley-Sherples v. Barthe* (1922), 1 A.C. 215; 91 L.J.P.C. 81; (1922) 1 W.W.R. 100; 62 D.L.R. 515.

As the subject-matter of taxation under the Quebec Act was thus held to be property actually situated outside the province, or an event relating to such property taking place outside, the decision gives no light as to how far the provinces may resort to the maxim *mobilia sequuntur personam* in justification of the imposition of a succession duty, strictly so called. Had the

subject-matter of taxation been the right of the beneficiary to call upon the executor to fulfil the trust in its entirety, the argument could doubtless have been advanced that such right was a chose in action existing in Quebec, the beneficiary not having the right to require transfer of any particular asset of the deceased by reference to its locality. See judgment of Duff, C.J.C., in *Cotton v. The King*, 45 S.C.R. 469; (1912) 1 D.L.R. 398; *Lord Sudeley v. Attorney-General* (1897), A.C. 11; 66 L.J.Q.B. 21; 75 L.T. 398; 13 T.L.R. 38; *Attorney General of Nova Scotia v. Davis et al* (1937), 3 D.L.R. 673.

In *Lord Sudeley v. Attorney-General*, *supra*, Lord Davey characterises the rights of beneficiaries in general as follows:

"Their right, and the only right which they could enforce adversely, is to have the administration completed and the residuary estate ascertained and realized, either wholly or so far as may be necessary for the purpose, and to have one-fourth of the proceeds paid to them."

The locality of the rights of beneficiaries would seem to be in the place where the domiciliary executor or administrator is resident. This being so, it is difficult to understand why the province of the domicile cannot subject such rights to taxation, irrespective of where the movable or personal property of the deceased is physically located. Speaking of the local situation of the rights of beneficiaries, Lord Halsbury, in the same case, says:

"The local character of the thing to which the legatee is entitled—call it a debt, or call it something that must be administered either by trustee or executor—is fixed by the persons—call them debtors or call them trustees—who are in this country . . . If it is a debt, and the debtor is here, the character of the asset is fixed by the residence of the debtor."

Doubtless as a consequence of the decision in the *Gary* case, the Quebec Beneficiaries Seizin Act was repealed by chapter 30, Statutes of 1938.

#### Annulment of Deed

*Kack v Savard* (1936), 41 Que. P.R. 238.

Where a demand is made by heirs for the annulment of a deed made by the deceased *de cuius* to their detriment, they are not bound to pay the succession duties before succeeding in having the deed set aside.

#### Valuations and Situs of Assets

*Re Mathews* (1938), 2 D.L.R. 763.

In reply to certain questions submitted to the York County Surrogate Court, Ontario, Barton, Co. Ct. J., held as follows:

(1) Under section 3 of the Ontario Succession Duty Act the value of stocks at the time of death should be taken.

(2) Duty paid on the transfer of certain shares in Quebec was not deductible from the aggregate value of the estate before fixing the succession duty payable in Ontario, as there was no order-in-council extending the provision of section 8 of the Act to Quebec.

(3) Certain foreign bonds held in Ontario were held to be specialties and so situate where they were held.

(4) Certain foreign promissory notes, held in Ontario, were held subject to duty.

(5) Non-taxable assets must be included in the aggregate value of the estate.



(6) Certain shares in foreign companies held in Ontario but not transferable therein were held not taxable. The shares could only be dealt with outside Ontario and therefore were so situate. It was argued that the shares were taxable if transferable in more than one place, citing *Re Clark, McKechnie v. Clark* (1904), 1 Ch. 294; 74 L.J. Ch. 188; 89 L.T. 736; 52 W.R. 212; 20 T.L.R. 101; *Re Ashcroft, Clifton v. Strauss* (1927), 1 Ch. 313; 96 L.J. Ch. 205. These cases were distinguished on the ground that in both one of the places of transfer was in England.

#### Value of Gifts Inter Vivos

*Rex and Attorney-General for Saskatchewan v Mellicke* (1938), 3 D.L.R. 33; (1938) 2 W.W.R. 97, varying (1937) 4 D.L.R. 709; (1937) 3 W.W.R. 433

Emil Julius Mellicke died on 23rd September, 1934, in Vancouver, British Columbia, where he had been domiciled since 1923. In 1925 he transferred a farm in Saskatchewan to Home Farms, Limited, for \$118,700, payable by the issue of 697 shares of the par value of \$100, and \$49,000 in money. At his direction, the shares were issued in equal proportions to his seven children; and he assigned the \$49,000 to them in equal shares. In 1929 the deceased transferred other assets to Home Farms, Limited, in consideration of the issue to him or his nominee of 242 shares and \$2.90 in cash. These shares were issued to his wife at his direction. A sum of \$1,790 was remitted by the deceased to one of his sons in respect of the purchase price of certain Saskatchewan land.

Deceased had owned a substantial block of shares in two Saskatchewan newspaper companies. In June, 1927, he sold these newspaper shares to Home Farms, Limited, for \$113,000, of which he received \$8,000 in cash, and the balance by the issue of 1,050 shares. At his direction these shares were issued in equal proportions to each of his seven children. In the same year two of the deceased's sons acquired the remainder of the issued shares of the two newspaper companies. In November, 1927, acting on behalf of all the shareholders, the sons agreed to sell to Armadale Corporation all the stock of the two companies for an amount over \$2,230,000, plus the profits of the last three months of that year. The result was that the newspaper shares owned by Home Farms, Limited, increased its capital by \$148,668.84.

In May, 1928, an agreement was entered into between Home Farms, Limited, and the children of the deceased, whereby for an expressed consideration of \$113,000 the company assigned to the children all its interest in the contract with the Armadale Corporation and in all payments thereunder. The children did not in fact pay the \$113,000, that being the same amount which the deceased had received from the Home Farms, Limited, for the newspaper shares.

In an action to recover succession duties and penalties alleged to be owing to the Province of Saskatchewan, the defendants admitted that the shares in Home Farms, Limited, divided by the deceased amongst his children, together with the 242 shares given to his wife, were taxable, and to have been worth at the date of the death of the deceased \$55 a share, without any regard to the net sum of \$148,668.84 received by the children as a result of the sale of the newspaper shares to the Armadale Corporation. The plaintiffs contended that the tax was payable on the \$148,

668.84 as property passing on the death, on the ground that the transaction was a colourable one, a mere cloak or sham intended to cover a gift: that the \$148,668.84 was an accretion or increment to the shares of Home Farms, Limited; that the assignment of May, 1928, effected an unauthorized distribution of the capital of Home Farms, Limited, and that the moneys thus distributed continued to be, for the purpose of taxation, an asset of Home Farms, Limited, and that the value of the shares should be increased accordingly.

It was held, Martin, J.A. dissenting, that while the transaction was not a sham, nor was the assignment of May, 1928, a camouflage for a gift, nevertheless the \$148,668.84 was a capital increase to the value of the 1,050 shares in Home Farms, Limited, gifted by the deceased, and that this increase was subject to duty.

It was also held that the sum of \$1,790 remitted by the deceased to one of his sons was a gift *inter vivos* and taxable.

#### Recovery of Penalties

In *Rex and Attorney-General for Saskatchewan v. Melicke*, *supra*, the Saskatchewan Court of Appeal held that in view of section 49 of The Treasury Department Act, Revised Statutes, 1930, chapter 21, and section 33 of the Interpretation Act, penalties for failure to file returns could be recovered by action in the Court of King's Bench by the Attorney-General in the name of His Majesty notwithstanding the fact that there is no provision in the Succession Duty Act itself for the recovery of such penalties. The contention, based on section 65 of The King's Bench Act, that the penalties, if recoverable at all, were recoverable only on an information by the Attorney-General, is met by the fact that there has never been in Saskatchewan a separate practice or procedure providing for the "revenue side of the Court."

#### Returns by Non-Residents

In the *Melicke* case, *supra*, the Saskatchewan Court of Appeal held that a provincial Succession Duty Act can require donees or successors to property within the province passing to them on the death of a person including property received from him by gifts *inter vivos*, to file returns with respect thereto, even though the deceased was not domiciled or resident within the province at the time of his death, and although the donees or successors were at all material times resident and domiciled outside the province, and it can impose penalties in the form of a heavier duty, and provide that an action in *personam* can be brought therefor for failure to file returns.

Per Martin, J.A.:

"The territorial jurisdiction of the Legislature attaches upon all persons permanently or temporarily within the territory while they are within it, but it does not follow them after they have left it and are living in another country: *Lefroy Canada's Federal System*, p. 185; *Dacey Conflict of Laws*, 5th ed., p. 402; *Schiboby v. Westenholtz* (1870), L.R. 6 Q.B. 155; 40 L.J.A.B. 73; 24 L.T. 83; 19 W.R. 587. Jurisdiction however exists with respect to land in the territory and may also be exercised in regard to movables. There appears to be no doubt that a Province can under its power of taxation impose taxes upon gifts *inter vivos* of property in the Province movable or immovable, no matter where the donees reside: *Rex v. Levitt* (1912), A.C. 212; *Toronto General Trusts Corporation v. The King* (1919), 46 D.L.R. 318. Here the defendants were the recipients of gifts of money and shares in Home Farms, Limited, a

corporation having its head office in the Province; under the statute these gifts are deemed to be property passing at the death. The Province has jurisdiction over the subject-matter of the gifts as property in the Province and also over the donees in respect of such property and in respect of any obligations connected therewith: *Dickey, Conflict of Laws*, 5th ed., pp. 40 et seq.; *Sirdar Gurdial Singh v. Rajah of Faridkote* (1893), A.C. 670, per the Earl of Selborne, at p. 683. When the defendants accepted the gifts from the deceased they received them subject to the obligations connected with such gifts of property in the Province provided by the Succession Duty Act."

#### Costs

In the *Meilicke* case, *supra*, it was held that the Imperial Crown Suits Act, 1855, is not in force in Saskatchewan, and that since the only provision for costs in The Saskatchewan Succession Duty Act, 1935, was in section 57, which provided that "duty shall be recoverable with full costs as a debt due to His Majesty," the Crown in an action for such duties, could recover costs, but the defendants could not do so.

#### Payment of Duties Before Action

*Mondor v. Forties* (1938), 42 Que. P.C. 51.

In this case it was held that where executors sue for arrears of rent under a lease made by them after the death of the testator, it is not necessary for them to plead that succession duties have been paid on the estate, and an exception to the form based on this omission will be rejected. Rents, under Article 451 of the Civil Code, are civil fruits acquired day by day, and rents accrued after the testator's death consequently form no part of his estate.

#### Situs of Shares

*Re Thoburn, Ivey et al. v. The King* (1939), 1 D.L.R. 631; 66 Que. K.B. 37, reversing 76 Que. S.C. 543.

The executors of William Thoburn, deceased, paid under protest certain succession duties claimed by the Province of Quebec. They subsequently, by petition of right, asked for reimbursement of the amount paid. The property, in respect of the transmission of which duty had been collected, consisted of certain bonds and shares.

The trial judge granted the petition as to the bonds of the Canadian Northern Western Railway Company and rejected it as to the other items in dispute, but the respondent had agreed at the hearing that the petition should be granted as to the other bonds and had tendered the duties paid on the Canadian Pacific Railway Company stock.

In the appeal, the issue was as to the duties claimed in respect of the transmission of 300 shares of Bell Telephone Company of Canada; 800 shares of Consolidated Mining and Smelting Company; 120 shares of the Canada Steamship Lines, Limited; and 120 shares of St. Maurice Valley Corporation.

The deceased, at the time of his death, held share certificates in these four companies in the Province of Ontario, where he was domiciled and where he died.

It was held that the claim for reimbursement of the duties paid on the transmission of these shares was well founded, and that the prayer of the petition should be granted. While the head offices of the companies were in Montreal, they maintained transfer registries in the Province of Ontario, and the share certificates were found in that province on the death of the deceased.

It was further held that section 214, added to the Dominion Companies Act by chapter 27, Statutes of Canada, 1932, dealing with the establishment of branch offices of Dominion companies, was merely declaratory and not retroactive legislation. Accordingly, shares in a Dominion company, whose head office was in Montreal, and which maintained transfer offices in Ontario, could be validly disposed of in Ontario in 1928, and certificates covering such shares being found there upon the death of the owner at that time, they were not situate in Quebec for succession duty purposes.

#### Reciprocal Arrangements

*In re Beck Estate; Attorney-General for British Columbia v. Union Trust Company, Limited, and Beck* (1939), 2 D.L.R. 439; (1939) 1 W.W.R. 206; 53 B.C.R. 423, reversing (1938) 3 D.L.R. 789; (1938) 3 W.W.R. 24; 53 B.C.R. 120.

In 1906 a British Columbia Order-in-Council was passed providing for a reciprocal arrangement with Ontario for allowance of succession duties. In 1937 the order was rescinded as from 1st June, 1937, the date upon which the arrangement was cancelled by the Ontario Government.

Herbert Harvey Beck died on 21st June, 1931, domiciled in British Columbia, and owning assets situate in Ontario. The Ontario assessment for succession duties was made in 1937, and paid in January, 1938. Following the British Columbia assessment, a claim was made for an allowance equal to the amount paid in Ontario on the personal property.

The British Columbia Court of Appeal held that the Succession Duty Act, 1924, chapter 244, being *ultra vires*, the "allowance" provided for by section 9 in respect of succession duties paid elsewhere was legally non-existent, and section 51(2) of the 1934 Act, continuing in force the "exemptions" of the former Act in respect of succession duty payable before the coming into force of the 1934 Act, did not apply to "allowances". It was also held that section 13(1) of the Interpretation Act, preserving rights accrued under a repealed statute, did not apply to an *ultra vires* statute, although declared to be repealed. The allowance for succession duty paid elsewhere pursuant to a "reciprocal arrangement" could be claimed only if paid in the foreign jurisdiction prior to cancellation of the reciprocal arrangement.

#### Limitation of Action for Succession Duty

*In re The Succession Duty Act; In re Cloutier Estate* (1939), 2 W.W.R. 23.

This was a motion at the Instance of the Provincial Treasurer of Manitoba made under section 21 of the Manitoba Succession Duty Act, 1934, chapter 42, to determine what property of Gabriel Cloutier, late of St. Norbert, priest, deceased, was liable to duty under the Act. The executor of the will of the deceased was the Reverend Leonide Primeau. On 5th May, 1930, the executor filed a succession duty affidavit disclosing assets valued at \$5,570, from which it appeared that the estate was not subject to duty. The Administrator of Succession Duties wrote to him on 6th May, 1930, advising him that there was no duty payable. At a later date, the succession duties department ascertained that the succession duty affidavit was not correct, and claim was made for duty on the basis of the discovery of assets, alleged to be part of the estate of the deceased, and having the effect of increasing the value of the estate to \$43,347.11. The Crown contended that the non-disclosure of the additional items of property amounted to fraud.

The executor gave detailed explanations as to why he had omitted to include the additional properties, and it was held:

(1) That the trust account amounting to \$20,300 was held for the niece of the deceased who was also his housekeeper. Since she had rendered extraordinary services to the deceased and since the account had not been disturbed for a number of years prior to the death of the deceased, it was not an asset of the estate, and there was no fraud on the part of the executor in omitting it from his return.

(2) The cheque for \$16,000 given to La Corporation Archiepiscopale Catholique Romaine de St. Boniface was not a loan, but was payment of a liability incurred by the deceased in arranging for the building of a new church for the parish of St. Norbert, and was not part of the estate of the deceased.

(3) As to the remaining items, while the executor had not advised the department of the corrections, it was not shewn that he deliberately intended to mislead, and there was no fraud such as would extend the time under the Statute of Limitations, chapter 30, Statutes of Manitoba, 1931.

In these circumstances, it was held that there was no fraud by the executor and that the claim of the Crown for succession duty failed by reason of the fact that six years had elapsed since the cause of action arose.

**NOTE.** The claim of the Province of Manitoba for succession duties in this case was barred by the provision contained in clause (1) of subsection (1) of section 3 of The Manitoba Limitations of Actions Act, 1931, being chapter 30 of the Statutes of that year. The Act was made applicable to the Crown, the expression "action" being defined therein as including any civil proceeding by or against the Crown.

The general rule is that statutes of limitation do not affect the Crown unless it is expressly mentioned.

*Rustomjee v R.* (1876), 1 Q.B.D. 487; 45 L.J.Q.B. 249; 34 L.T. 278; 24 W.R. 428; *Attorney-General v Lordan* (1906), 40 I.L.T. 98; *Allstadt v Gortner* (1899), 31 O.R. 495; *Reg. v Williams* (1876), 39 U.C.Q.B. 397.

#### **Powers of Special Investigator**

*Kaufman v McMillen* (1939), 3 D.L.R. 446; (1939) O.W.N. 415.

This was a motion to continue until trial a temporary injunction granted by Mackay, J., to restrain a special investigator under the Ontario Succession Duty Act from compelling production of documents relating to liability for duty.

The plaintiffs were the executors of the will of Jacob Kaufman, deceased, some of the beneficiaries under the will, and two companies in which one of the individual plaintiffs was interested. The defendant was a "special investigator" appointed by the Provincial Treasurer, in exercise of a power supposed to have been conferred upon him by section 8 of The Succession Duty Amendment Act, 1937, now cited as section 30a of The Succession Duty Act, Revised Statutes of Ontario, 1937, chapter 26. The defendant had demanded production by the Dominion Commissioner of Income Tax of certain files, and had also commanded the attendance before him of certain bank managers and the production by them of records and documents.

The plaintiffs claimed a declaration that the defendant was not "authorized" or entitled by the procedure set out in section 30a of The Succession Duty Act to make any examination, investiga-

tion or enquiry relating to the estate, on the following grounds, namely:

(1) That the legislation was *ultra vires*;

(2) That section 46 of The Succession Duty Act excluded the application of section 30a, the deceased having died before 8th March, 1937.

The validity of the taxes in respect of "dispositions" and "transmissions", which took place in the lifetime of the deceased, was questioned, and section 30a was attacked on the ground that it constituted an attempt to destroy some privileges of preventing disclosure by banks and income tax authorities.

Rose, C.J.H.C., said that he did not think that, at this stage of the action, it could be assumed that the Provincial Treasurer was a "person entitled" to inspect income tax returns within the meaning of section 81 of the Dominion Income War Tax Act, or that section 30a of the Succession Duty Act in so far as it professed to destroy the privilege apparently attaching to income tax returns, was valid. While the privilege attaching to papers in possession of the banks appeared to be a civil right in the Province, concerning which the legislature might make laws, that did not lessen the force of the contention that section 30a could not be effective to authorize the defendant to infringe this privilege to compel payment of taxes not validly imposed, and that the validity of the taxes, and consequently the validity of section 30a was so doubtful that the defendant ought not pending the trial to be allowed to use the powers alleged to have been conferred. The learned chief justice held that the questions raised by the plaintiffs cast so much doubt upon the existence of the right which the defendant asserted to compel the disclosure of documents and communications *prima facie* privileged that it was the plain duty of the court to cause a suspension of operations pending the determination of the dispute.

The mere invasion of the *prima facie* right to refuse disclosure of the documents was an irreparable injury sufficient by itself to warrant an injunction notwithstanding the provision of section 32a of the Judicature Act, which, if its true intent be to prevent the grant of an injunction, was itself of doubtful validity and hence no bar to an interim injunction.

The injunction was accordingly continued until trial.

NOTE: Section 81 of the Dominion Income War Tax Act, being chapter 97, Revised Statutes of Canada, 1927, provides as follows:

"81. No person employed in the service of His Majesty shall communicate or allow to be communicated to any person not legally entitled thereto, any information obtained under the provisions of this Act, or allow any such person to inspect or have access to any written statement furnished under the provisions of this Act."

As income tax returns are official documents, it would appear to follow that the Crown in right of the Dominion could not be compelled to produce them in court if a responsible officer of the Income Tax Department stated, upon oath, that their production would be contrary to the public interest.

*Re Hargreaves (Joseph), Ltd.* (1900), 1 Ch. 347; 69 L.J. Ch. 183; 82 L.T. 132; 48 W.R. 241; 16 T.L.R. 155.

Per Wright, J. (69 L.J. Ch. 185):

"It seems to me that if there is sufficient evidence that in the opinion of the Board of Inland Revenue the public interests will suffer by the disclosure of documents, very strong reasons ought to be shown why I

should order such production. Income tax returns may contain confidential matter. It is of great importance to the public service that the public should be sure that the returns made by them shall not be disclosed. It is a matter of public concern that persons should have confidence in the secrecy of the procedure."

See also *Mitchell v. Koecker*, 18 L.J. Ch. 294; (1849) 11 Beav. 380; 12 L.T.O.S. 550; 50 E.R. 863.

With regard to the inspection and production of bank records, it is an implied term of the contract between a bank and its customer that the bank will not disclose to third persons, without the consent of the customer express or implied, either the state of the customer's account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the bank is compelled to do so by order of a court, or the circumstances give rise to a public duty of disclosure, or the protection of the bank's own interest requires it.

*Tournier v. National Provincial and Union Bank of England* (1924), 1 K.B. 461; 93 L.J.K.B. 449; 130 L.T. 682; 40 T.L.R. 214.

#### Situs of Insurance Moneys

*In re The Succession Duty Act, 1934; In re Corlet Estate* (1939), 2 W.W.R. 478; 6 Ins. L.R. 173.

In and during the years 1925 to 1928 Wilfred Ewan Corlet, who then was, and had been for twelve years prior thereto, a resident of Alberta, took out three policies of life insurance with the Metropolitan Life Insurance Company payable to his estate. In 1931 he executed a deed of settlement by which he agreed to assign the policies to a bank in the Isle of Man in trust for his mother and brother and certain other relatives. In pursuance of the deed he assigned the policies and the proceeds thereof to the bank and the assignments were filed at the head office of the company in Canada, which was at Ottawa. The company was registered in Alberta under The Companies Act, chapter 14, Statutes of Alberta, 1929. The policies were applied for at the Calgary office of the company and accepted at its head office. The premiums were made payable at the head office, and were all, in fact, paid by the deceased; and by the policies the company promised to pay the insurance moneys there.

It was held that the insurance moneys fell within section 5(f) of The Alberta Succession Duty Act, chapter 17, Statutes of Alberta, 1934, and were therefore property of the deceased passing on his death; and, under section 198(a) and (b) of the Alberta Insurance Act, chapter 31, Statutes of Alberta, 1926, the insurance contract was deemed to have been made in Alberta, and under section 236(2) thereof the insurance moneys were payable in Alberta. The moneys were therefore property situate within the province and were subject to duty.

It was further held that the provisions of The Alberta Insurance Act, 1926, and The Succession Duty Act, 1934, in relation to insurance, were *ultra vires* of the Alberta legislature.

Ewing, J., at page 485, says:

"The Succession Duty Act, 1934, purports to deal only with contracts made by residents of this province. The Alberta Insurance Act, 1926, which is not a taxing statute, says that an insurance contract such as that in question here shall be deemed to be made in this province. The contract was made between a resident of this province and a corporation

which, although its head office is outside the province, has an office or place of business in the province and is registered in Alberta under The Companies Act, 1929, chapter 14, and may sue and be sued in this province. If the donees were resident in the province it appears to me that no question could arise because under section 5, clauses (f) and (g), the deceased would in the language of Lord Loreburn (*Lethbridge v. Attorney-General* (1907), A.C. 19; 76 L.J.K.B. 94) be prevented from escaping by subtracting from his means during his life moneys which when he dies will reappear in the form of a beneficial interest accruing to someone. It would seem extraordinary if he could still escape by the simple expedient of causing the beneficial interest to reappear outside the province. I am of the opinion that the money receivable under the policies of insurance in question here are for the purposes of The Succession Duty Act, 1934, property of the deceased passing on his death and situate within the province and therefore subject to duty under the Act."

NOTE: (1) These observations of Ewing, J., indicate that the *situs* of property passing on the death of the deceased, and beneficial interests in such property, may not coincide. Thus, in this case, while the property itself was held to be locally situate in Alberta, the beneficial interests therein were situate in the Isle of Man. The judgment proceeds, at page 486:

"The mere fact that a beneficiary is a foreigner is not sufficient to exempt him from succession duty but the forum in this case would appear to be the Courts of the Isle of Man. See *In re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351, 47 L.J. Ch. 106."

(2) Sections 198 and 236(2) of The Alberta Insurance Act, 1926, chapter 31, provide as follows:

"198. A contract is deemed to be made in the province—

"(a) if the place of residence of the insured is stated in the application or the policy to be in the Province; or

"(b) if neither the application nor the policy contains a statement as to the place of residence of the insured, but the actual place of residence of the insured is within the Province at the time of the making of the contract."

"236.—(2) Insurance money shall be payable in the Province in lawful money of Canada."

It was held that the effect of these statutory provisions was to make the insurance moneys payable in Alberta, notwithstanding any provision in the policies to the contrary, and that the moneys were accordingly situate in Alberta. In support of this conclusion reference was made to the decisions in *Weiss v. State Life Insurance Company* (1935), S.C.R. 461; 2 Ins. L.R. 405; and *Rudolf v. Continental Life Insurance Company* (1915), 9 O.W.N. 327.

#### Situs of Shares

*Rice v. The King* (1939), 4 D.L.R. 701; 77 Que. S.C. 340.

The deceased, E. Wilbur Rice, was domiciled in New York during his lifetime, and owned certain shares in the International Nickel Company, the certificates for which were held for safe-keeping in Montreal. The company had its head office and principal assets in Ontario, but had branch registry offices in Montreal, New York and London, and the certificates in question were issued and registered in Montreal. It was held that the *situs* of the shares was in the Province of Quebec and they were subject to succession duty there.

It was further held that inheritance taxes paid to the United States Federal Government and to the State of New York were



not "a debt or charge existing at the time of death" within the meaning of section 8 of the Quebec Succession Duties Act, chapter 29, Statutes of 1925, since they arise in consequence of death. Hence such inheritance taxes are not proportionately deductible from that part of the estate situate within the Province of Quebec for the purpose of determining the duty payable to that province.

#### Legacies Free of Duty

*Re Reading* (1940), O.W.N. 9.

This was a motion by the executor of the estate of Wilmot B Reading, deceased, for the opinion of the High Court as to the proper interpretation of a direction in the will of the deceased.

By his will, the testator gave all his property to his executor upon trusts as set out in separate paragraphs. The first was a specific bequest of chattels, the second a direction for the conversion into money of his estate, and then followed clause (c) interpretation of which was desired, reading as follows:

"(c) To pay my just debts funeral and testamentary expenses and all succession duties and inheritance and death taxes that may be payable in connection with any insurance or any gift or benefit given by me to any person either in my lifetime or by survivorship or by this my will or by any codicil hereto"

The succeeding eight paragraphs of the will each directed the payment of a pecuniary legacy to a named beneficiary. Paragraph (1) dealt with the residue, and read.

"(1) To keep invested the remainder of my estate and to pay the net annual income derived therefrom to . . ."

A life interest, with power to encroach on capital, was given to a named legatee, and paragraph (m) finally disposed of what was left on the termination of the life interest.

There were no persons benefiting under gifts *inter vivos* by the deceased, or under insurance policies made payable to direct beneficiaries, or by survivorship.

In these circumstances, Kelly, J., held that the deceased had sufficiently indicated an intention to make a gift of the amount necessary to pay succession duty to each of his legatees, and that the executor should not deduct from any such legacy the amount of any duty payable in respect thereof. In effect, the learned judge held that the will threw the whole burden of succession duties upon the residue. In the course of his judgment, he says:

"The reasoning of Street, J., in *Re Bolster* (1905), 10 O.L.R. 391, at p. 392, seems to apply to succession duties in this, that a simple direction to an executor to pay succession duties, without anything more, would merely repeat what the law requires of an executor without any such direction and would leave executor and legatee in the positions they would have occupied if no mention of succession duties had been made. However, in the will now before the Court, more than a simple direction to pay succession duties is to be found. When the testator directed his executor to pay succession duties on 'any gift—to any person—in my lifetime' he directed more than the performance of a statutory duty. The duty payable upon a gift perfected before the testator's death cannot be deducted from the gift by the executor, the subject-matter of the gift forming no part of the deceased's estate and never vesting in the executor. It follows that, if the executor pays such duty he must do so out of the funds of the estate, and, in a case for example where the donee of such a gift received no other benefit under the will, would have no right to relief over against the donee, who, by statute, is liable to pay the duty. Such

a direction to pay duty is, therefore, a gift of the amount of the duty to any person who in the testator's lifetime received a dutiable gift. Similarly, the words, 'or by survivorship' impose an obligation not to be found in the statute: *Re Booth* (1926), 36 O.W.N. 73; and in the case of duty payable upon survivorship, the direction to pay duty is actually a gift. It seems clear, also, that if an executor pays duty on insurance moneys payable, let us suppose, to a preferred beneficiary, he must do so out of the general funds of the estate, with no right to relief over against the preferred beneficiary who takes the insurance money directly under the contract and not as a beneficiary of the deceased's estate. In all of these cases the testator's direction to pay duty is in fact a gift out of the funds of the estate of the amount of the duty to those persons by a statute liable to pay. It is immaterial whether any beneficiaries of these classes exist; the language used indicates the intention . . . In the absence of anything in the will to show an intention to distinguish between beneficiaries in the matter of succession duties, and holding that the direction to pay in some cases clearly amounted to a gift, the testator by paragraph (c) sufficiently indicated his intention to make a gift of the amount necessary to pay succession duty to each of his legatees otherwise liable to pay. The executor should not deduct from any such legacy the amount of any duty payable in respect thereof."

NOTE. (1) It is difficult to reconcile the decision in this case with the principle that succession duty must be paid by the beneficiary, unless the testator expresses a clear intention to the contrary. The whole scope of the Ontario Succession Duty Act is that the person who receives a benefit is to pay the tax thereon, and, in the case of benefits conferred by will, the executor is required to deduct the tax therefrom when making distribution. To divert the tax from the legatees to the residue of the estate, must be, by directions, free from ambiguity. In *Dos Passos*, on the Law of Collateral Inheritance, at page 210, the author says:

"A testator possesses the general power to relieve the legatees from the payment of the tax by throwing it on the residue of the estate, when it is sufficient to make payment, but an intention that the devise shall be free of the tax, as between the estate and the devisee, must clearly appear. A mere declaration that it is to be clear from all charges and incumbrances, or other legal demands is not sufficient."

Again, in *Gude v. Mumford* (1837), 2 Y. & C. 445; 160 E.R. 471, Alderson, B., says:

"It is clear that the principles upon which questions as to the payment of legacy duty proceed are those which govern the construction of wills. In order to arrive at the decision that a legacy is to be paid free of duty, the Court must be satisfied that the intention of the testator in that respect has been clearly made out. *Prima facie*, the law must take its ordinary course, and the legacy must be left in the circumstances in which the law places it; nevertheless it is competent for the testator, by words, to direct otherwise."

By his will, Wilmot B. Reading directs his executor to pay two classes of duties as follows:

- (a) Duties in respect of gifts *inter vivos*, insurance, and property passing by survivorship;
- (b) Duties on gifts or benefits conferred by his will.

When executing his will in these terms the testator must have known, or must be presumed to have known, that it was the duty of his executor, without any special direction, to retain and pay the duty out of any benefits conferred by the will itself. Similarly, he must have known that no such function existed with

respect to gifts *inter vivos*, insurance, and property passing by survivorship. This being so, the special direction in relation to the tax on the benefits conferred by the will did not alter the duty of the executor, the testator not having indicated the residue of the estate as a special fund for payment of the tax on these benefits, and not having made the bequests free of taxation. In other words, there does not appear to be any clear indication in the will that the testator intended the benefits to be free of tax so far as the beneficiaries under the will are concerned. In the absence of such clear and unambiguous direction by the deceased, it is difficult to understand how the burden of the duties on these particular benefits could be thrown on the residue.

It is no doubt true that the effect of the will is to relieve any beneficiaries who benefit otherwise than under the will from at least a portion of their liability in respect of succession duties, but this fact, in itself, scarcely justifies the conclusion that beneficiaries in general were intended to be similarly benefited. On the contrary, any inference which may be drawn from this circumstance would seem to point in exactly the opposite direction, the deceased being aware of the special benefit thus conferred by him on one class of beneficiaries. In effect, the deceased made the benefits provided by him in his lifetime free of duty, but made no such provision in regard to testamentary bequests. The circumstances are thus similar to those involved in the case of *In re Borough, Public Trustee v. Roberts-Gawen* (1938), 1 All E.R. 375; 82 Sol. Jo. 174. In that case the testator by his will gave a number of legacies free of duty and other legacies which were not expressly stated to be free of duty. The residuary clause provided for the payment of funeral and testamentary expenses, "and all death duties (payable in consequence of my death)". It was contended that the legacies which were not expressly given free of duty were by these last words made free of duty. It was held that the words "death duties (payable in consequence of my death)" meant the duties which would in any event be payable in respect of property passing on the death, whatever disposition might be made of it by the testator. The legacy duty on the legacies not given free of duty therefore was not payable out of the residue.

See, also, *Re Baxter* (1914), 136 L.T. Jo. 480, where a testator made his will in paragraphs, and certain of the legacies were to be paid free of duty and in other cases there was no reference to duty. When dealing with his residue he referred to payment thereof of "all duties payable under this my will". It was held that this direction applied only to duties payable by reason of directions in the will.

(2) While the learned judge holds that clause (c) of the will of Wilnot B. Reading confers an additional benefit upon all the beneficiaries to the extent of the duty thereon, he is apparently of the opinion that this additional benefit is not subject to taxation, as, by his judgment, he directs that,—"The executor should not deduct from any such legacy the amount of any duty payable in respect thereof." His holding in this regard differs from the views expressed by the Saskatchewan Court of Appeal in *Re Anderson, Canada Permanent Trust Company v. McAdam* (1938), 4 D.L.R. 51; 22 S.L.R. 610. In the course of his judgment in that case, Martin, J.A., says:

"It seems to me that inasmuch as a provision in a will for the payment of a legacy free of duty in effect creates an additional legacy, which is subject to duty, just as the original legacy, the assessment of the appropriate duty on the two legacies combined would fulfil the requirements of the Succession Duty Act. If this is the correct view of the law, the legatee, it is true, receives somewhat less than the total amount of the legacy stated to be duty free, but a knowledge of the law must be attributed to the testator."

There is no provision in the Ontario Succession Duty Act to the effect that money applicable in payment of succession duty is itself exempted from duty. This being so, it is difficult to understand on what authority it can be said that an executor is justified in paying over such money without looking to the beneficiary for recoupment in respect of the duty applicable thereto.

The English Legacy and Succession Duty Acts make special provision for exempting from taxation moneys applicable in payment of duties. See section 21 of the English Legacy Duty Act, 1796, and section 18 of The Succession Duty Act, 1853.

(3) The judgment of Kelly, J., in this case indicates that in his opinion no authority whatsoever has been conferred upon an executor or administrator by the Ontario Succession Duty Acts, either present or past, in the matter of duties applicable to benefits not conferred by a will or upon intestacy, or that no such authority could be conferred unless the executor or administrator are obligated to act accordingly. If these views are accurate, then the question arises as to what the legislature had in mind in enacting subsection (2) of section 25 of The Ontario Succession Duty Act, being chapter 26, Revised Statutes of Ontario, 1937, as follows:

"25.—(2) Every sum of money retained by an executor or trustee or paid into his hands for the duty on any property or on the transmission thereof shall be paid by him forthwith to the Treasurer, or as he may direct."

This provision refers to two classes of duties, namely:

(a) Duties retained by an executor out of properties passing through his hands; and

(b) Duties paid to him by beneficiaries in respect of other properties, such as gifts *inter vivos*, and insurance moneys.

The legislature must accordingly have contemplated that the executor or administrator should be authorized to act as the agent of the Crown not only in relation to the duties on estate property strictly so called, but also to a limited extent in relation to the receipt of duties applicable to other properties where the beneficiaries request him to accept payment of such duties and, in turn, account to the Crown in respect thereof. This limited responsibility is similar to that imposed upon an executor or administrator by subsection (2) of section 6 of the English Finance Act, 1894. Even if it is admitted that an executor or administrator is not obligated to accept this statutory authority, this does not make him any the less accountable in respect of any duties paid to him by beneficiaries pursuant to the power of accepting payment thus vested in him. In actual practice, it is quite a common occurrence for an executor or administrator to pay all duties claimed by the Crown, including the duties on properties not coming into his hands. In cases where such payment is made, doubtless the executor or administrator protects himself by collecting from the beneficiary in the first instance or retaining sufficient funds out of the benefits to which the beneficiary is entitled.



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